

(22,463)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 197.

EDMUND S. NASH, SPENCER P. SHOTTER, ET AL.,
PETITIONERS,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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a

Transcript of Record.

United States Circuit Court of Appeals, Fifth Circuit.

No. 1951.

EDMUND S. NASH et al., Plaintiffs in Error,
versus

THE UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Southern
District of Georgia.

[Original record filed June 14, 1909.]

U. S. Circuit Court of Appeals. Filed Jul- 24, 1909.

CHARLES H. LEDNUM, *Clerk.*

1

Indictment.

UNITED STATES OF AMERICA,

Eastern Division, Southern District of Georgia:

United States Circuit Court, November Term, 1907.

The Grand Jurors of the United States, selected, chosen and sworn in and for the Eastern Division of the Southern District of Georgia, upon their oaths present:

First Count. That heretofore, to-wit: on the first day of May, in the year of our Lord one thousand nine hundred and seven, American Naval Stores Company, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia; National Transportation and Terminal Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey; one Edmund S. Nash, one Spencer P. Shotter, one J. F. Cooper Myers, one George Meade Boardman, one C. J. De Loach, whose further given name is to the grand jurors aforesaid unknown, and one Carl Moller, within said division and district and within the jurisdiction of this Court, unlawfully and knowingly amongst themselves and with divers other persons to the grand jurors aforesaid unknown, combined, conspired, confederated and agreed together to restrain trade and commerce among the several States of the United States and with foreign nations.

For that said American Naval Stores Company was, from the first day of May, A. D. 1907, up to and including the date of the finding of this bill of indictment, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, with its principal office in the City of Savannah, County of Chatham,

within the Eastern Division of the Southern District of Georgia, and having branch offices in the City of New York, in the State of New York; Philadelphia, in the State of Pennsylvania; Chicago, in the State of Illinois; St. Louis, in the State of Missouri; Cincinnati, in the State of Ohio; Louisville, in the State of Kentucky; Wilmington, in the State of North Carolina; Brunswick, in the State of Georgia; Jacksonville, Tampa, Pensacola and Fernandina, in the State of Florida; New Orleans, in the State of Louisiana;

- 2 Mobile in the State of Alabama, and Gulfport, in the State of Mississippi, and divers other places to the grand jurors aforesaid unknown, and was during all of said time engaged in trade and commerce among the several States of the United States and with foreign nations, within the true intent and meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"; that is to say, was engaged in buying, selling, shipping and exporting spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly called naval stores, within the States of Georgia, North Carolina, South Carolina, Florida, Alabama, Mississippi, Louisiana and divers other States of the United States, and divers European countries, to the grand jurors aforesaid unknown, and engaged in buying spirits of turpentine, rosin and the products of pine forests and turpentine farms commonly known as naval stores, in the State of Georgia, North Carolina, South Carolina, Florida, Alabama, Mississippi and Louisiana and shipping said spirits of turpentine, rosin and the products of pine forests and turpentine commonly known as naval stores to and selling the same in the States of New York, Massachusetts, Pennsylvania, Kentucky, Ohio, Illinois and the countries of Great Britain, Germany, Belgium and divers other states and divers other foreign nations to the grand jurors aforesaid unknown; and that during said time said Edmund S. Nash was the president and chief executive officer of said American Naval Stores Company; and the said Spencer P. Shotter was the chairman of the Board of Directors and one of the principal executive officers of said American Naval Stores Company; and said J. F. Cooper Myers was the vice president and one of the chief executive officers of said company, and said George Meade Boardman was the treasurer and one of the chief executive officers of said company, and said C. J. De Loach, was the secretary and one of the principal officers of said company, and the said Carl Moller was the manager of the Jacksonville, Florida, branch and an agent and employé of said company; and that from said first day of May, 1907, up to and including the date of the finding of this bill of indictment, the said National Transportation and Terminal Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and owning and controlling warehouses and terminal facilities for handling spirits of turpentine, rosin and the products of pine forest and turpentine farms, commonly known as naval stores, at Fernandina, Jacksonville, Tampa, Pensacola, in the State of Florida; Mobile, in the State of Alabama; Gulfport, in the State of Missis-
- 3

issippi, and divers other ports and places within the United States to the grand jurors aforesaid unknown, and at said named ports and places engaged in storing spirits of turpentine and rosin on the yards and in tanks and issuing warehouse receipts against and representing said spirits of turpentine and rosin, making contracts for the storage thereof and collecting therefor; and that during all of said time said J. F. Cooper Mayers was the president and chief executive officer of said National Transportation and Terminal Company and the said C. J. De Loach was the secretary and one of the principal executive officers of said National Transportation and Terminal Company, and the said Carl Moller was the manager of the Jacksonville, Florida, branch of said National Transportation and Terminal Company and an agent and employé thereof; and that on said first day of May, in the year of our Lord one thousand nine hundred and seven, the said American Naval Stores Company, said National Transportation and Terminal Company, the said Edmund S. Nash, said Spencer P. Shotter, said J. F. Cooper Myers, said George Meade Boardman, said C. J. De Loach and said Carl Moller, within the Eastern Division of the Southern District of Georgia and within the jurisdiction of this Court, did unlawfully combine, conspire, confederate and agree together to restrain trade and commerce among the several States of the United States and with foreign nations in the aforesaid articles of commerce between the several States and foreign nations, to-wit: spirits of turpentine, rosin and the products of pine forests and turpentine farms, comonly called naval stores, the said restraint of trade and commerce among the several States and foreign nations to be effected, amongst other ways, as follows: by controlling, manipulating and arbitrarily bidding down and depressing in the market and market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices; by coercing and causing naval stores receipts, which would normally and naturally flow to one port of the United States to be diverted to another port of the United States; by purchasing thereafter at divers times a large part of its supplies at naval stores ports known as closed ports and wilfully and with the deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basis or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on a basis of the market at Savannah; by coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts, and refusing to purchase from such factors and brokers unless such contracts were entered into; by circulating and publishing false statements as to naval stores production and stocks in hands of producers and their immediate representatives; by issuing and causing to be circulated and hypothecated fraudulent warehouse receipts; by fraudulently grading, regrading and raising grades of rosins and

falsely gauging spirits of turpentine; by attempting to bribe employés of competitors and factors so as to obtain information as to competitors' business and stocks; by inducing consumers by payment of bonuses and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices, by making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers; by at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors; by wilfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production—each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such trade and commerce among the several States and foreign nations in the aforesaid articles of commerce, and destroying competition and restraining trade in the aforesaid articles of commerce; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the said United States.

Second Count. And the grand jurors aforesaid, upon their oaths as aforesaid, do further present that heretofore, to-wit: on the first day of May, in the year of our Lord one thousand nine hundred and seven, American Naval Stores Company, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia; National Transportation and Terminal
5 Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey; one Edmund S. Nash, one Spencer P. Shotter, one J. F. Cooper Myers, one George Meade Boardman, one C. D. De Loach, whose further given name is to the grand jurors aforesaid unknown, and one Carl Moller, within the Eastern Division of the Southern District of Georgia, did unlawfully combine, conspire, confederate and agree together among themselves and with divers other persons to the grand jurors aforesaid unknown, to monopolize a part of the trade and commerce among the several states of the United States and with foreign nations, that is to say, the trade and commerce among the several States and foreign nations in spirits of turpentine and rosin and the products of pine forests and turpentine farms, commonly known as naval stores.

For that said America- Naval Stores Company was, from the first day of May, A. D. 1907, up to and including the date of the finding of this bill of indictment, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, with its principal office in the City of Savannah, County of Chatham, within the Eastern Division of the Southern District of Georgia, and having bra-ch offices in the City of New York, in the State

of New York; Philadelphia, in the State of Pennsylvania; Chicago, in the State of Illinois; St. Louis, in the State of Missouri; Cincinnati, in the State of Ohio; Louisville, in the State of Kentucky; Wilmington, in the State of North Carolina; Brunswick, in the State of Georgia; Jacksonville, Tampa, Pensacola and Fernandina, in the State of Florida; New Orleans, in the State of Louisiana; Mobile, in the State of Alabama, and Gulfport, in the State of Mississippi, and divers other places to the grand jurors aforesaid unknown, and was during all of said time engaged in trade and commerce among the several States of the United States and with foreign nations, within the true intent and meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies;" that is to say, was engaged in buying, selling, shipping and exporting spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly called naval stores, within the States of Georgia, North Carolina, South Carolina, Florida, Alabama, Mississippi, Louisiana and divers other States of the United States and divers European countries, to the grand jurors aforesaid unknown, and engaged in buying spirits of turpentine, rosin and products of pine forests and turpentine farms, commonly known as naval stores, in the States of Georgia, North Carolina,

6 South Carolina, Florida, Alabama, Mississippi and Louisiana, and shipping said spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly known as naval stores, to and selling the same in the States of New York, Massachusetts, Pennsylvania, Kentucky, Ohio, Illinois and the countries of Great Britain, Germany, Belgium and divers other States and divers other foreign nations to the grand jurors aforesaid unknown; and that during said time said Edmund S. Nash was the president and chief executive officer of said American Naval Stores Company; and the said Spencer P. Shotter was the chairman of the Board of Directors and one of the principal executive officers of said American Naval Stores Company; and said J. F. Cooper Myers was the vice president and one of the chief executive officers of said company, and George Meade Boardman was the treasurer and one of the chief executive officers of said company, and said C. J. De Loach was the secretary and one of the principal officers of said company, and the said Carl Moller was the manager of the Jacksonville, Florida, branch and an agent and employé of said company; and that from said first day of May, 1907, up to and including the date of the finding of this indictment the said National Transportation and Terminal Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and owning and controlling warehouses and terminal facilities for handling spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly known as naval stores, at Fernandina, Jacksonville, Tampa, Pensacola, in the State of Florida; Mobile, in the State of Alabama; Gulfport, in the State of Mississippi, and divers other ports and places within the United States to the grand jurors aforesaid

unknown, and at said named ports and places engaged in storing spirits of turpentine and rosin on yards and in tanks and issuing warehouse receipts against and representing said spirits of turpentine and rosin, making contracts for the storage thereof and collecting therefor; and that during all of said time said J. F. Cooper Myers was the president and chief executive officer of said National Transportation and Terminal Company and the said C. D. De Loach was the secretary and one of the principal executive officers of said National Transportation and Terminal Company, and the said Carl Moller was the manager of the Jacksonville, Florida, branch of said National Transportation and Terminal Company and an agent and employé thereof; and the said American Naval Stores Company, said National Transportation and Terminal Company, said Edmund S. Nash, said Spencer P. Shotter, said

7 J. F. Cooper Myers and said Carl Moller, having already secured to themselves the control of more than half of the trade and commerce among the several States of the United States and with foreign nations in the aforesaid articles of commerce, did, then and there on said first day of May, in the year of our Lord one thousand nine hundred and seven, unlawfully combine, conspire, confederate and agree together amongst themselves and with divers other persons to the grand jurors aforesaid unknown, to further monopolize the trade and commerce amongst the several States and with foreign nations in the aforesaid articles of commerce, said monopolizing to be effected amongst other ways, as follows: by controlling, manipulating and arbitrarily bidding down and depressing the market and market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices; by coercing and causing naval stores receipts which would normally and naturally flow to one port of the United States to be diverted to another port of the United States; by purchasing thereafter at divers times a large part of its supplies at naval stores ports known as closed ports, and wilfully and with deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basis or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on a basis of the market at Savannah; by coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contract were entered into; by circulating and publishing false statements as to naval stores production and stock in hand of producers and their immediate representatives; by issuing and causing to be circulated and hypothecated fraudulent warehouse receipts; by fraudulently grading, regrading and raising grades of rosins and falsely gauging spirits of turpentine; by attempting to bribe employés of competitors and factors so as to obtain information as to competitors' business and stocks;

by inducing consumers by payment of bonuses and threats of boycott to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices;

8 by making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offer; by at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitor- to meet said prices, which said prices would be ruinous to themselves as well as to their competitors; by wilfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production—each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such trade and commerce among the several States and foreign nations in the aforesaid articles of commerce, and destroying competition and monopolizing trade in the aforesaid articles of commerce; contrary to the form of the statutes in such case made and provided and against the peace and dignity of the said United States.

Third Count. And the grand jurors aforesaid, upon their oaths as aforesaid, do further present that heretofore, to-wit: on the first day of May, in the year of our Lord one thousand nine hundred and seven, American Naval Stores Company, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia; National Transportation and Terminal Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey; one Edmund S. Nash, one Spencer P. Shotter, one J. F. Cooper Myers, one George Meade Boardman, one C. J. De Loach, whose further given name is to the grand jurors aforesaid unknown, and one Carl Moller, within the Eastern Division of the Southern District of Georgia and within the jurisdiction of this Court did then and there wilfully, knowingly and unlawfully monopolize and attempt to monopolize a part of the trade and commerce among the several States of the United States and with foreign nations; that is to say, the trade and commerce among the several States and with foreign nations in spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly known as naval stores.

For that said American Naval Stores Company was, from the first day of May, A. D. 1907, up to and including the date of the finding of this bill of indictment, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, with its principal office in the City of Savannah, County of Chatham, within the Eastern Division of the Southern District of Georgia, and having branch offices in the City of New York, 9 in the State of New York; Philadelphia, in the State of Pennsylvania; Chicago, in the State of Illinois; St. Louis, in the State of Missouri; Cincinnati, in the State of Ohio; Louisville, in

the State of Kentucky; Wilmington, in the State of North Carolina; Brunswick, in the State of Georgia; Jacksonville, Tampa, Pensacola and Fernandina, in the State of Florida; New Orleans, in the State of Louisiana; Mobile, in the State of Alabama, and Gulfport, in the State of Mississippi, and divers other places to the grand jurors aforesaid unknown, and was during all of said time engaged in trade and commerce among the several States of the United States and with foreign nations, within the true intent and meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies;" that is to say, was engaged in buying, selling, shipping and exporting spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly known as naval stores, within the States of Georgia, North Carolina, South Carolina, Florida, Alabama, Mississippi, Louisiana and divers other States of the United States, and divers European countries, to the grand jurors aforesaid unknown and engaged in buying spirits of turpentine, rosin and the products of pine forests and turpentine farms commonly known as naval stores, in the State of Georgia, North Carolina, South Carolina, Florida, Alabama, Mississippi and Louisiana, and shipping said spirits of turpentine, rosin and the products of pine forests and turpentine farms, commonly known as naval stores, to and selling the same in the States of New York, Massachusetts, Pennsylvania, Kentucky, Ohio, Illinois and the countries of Great Britain, Germany, Belgium and divers other states and divers other foreign nations, to the grand jurors aforesaid unknown; and that during said time said Edmund S. Nash, was the President and chief executive officer of said American Naval Stores Company, and the said Spencer P. Shotter was the chairman of the board of directors and one of the principal executive officers of said American Naval Stores Company, and said J. F. Cooper Myers was the vice-president and one of the chief executive officers of said company, and said George Meade Boardman was the treasurer and one of the chief executive officers of said Company, and said C. J. De Loach was the secretary and one of the principal officers of said Company, and the said Carl Mollar was the manager of the Jacksonville, Florida, branch and an agent and employé of said Company;

and that from said first day of May 1907 up to and including
 10 the date of the finding of this indictment, the said National Transportation and Terminal Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and owning and controlling warehouses and terminal facilities for handling spirits of turpentine, rosin and the products of pine forests and turpentine farms commonly known as naval stores, at Fernandina, Jacksonville, Tampa, Pensacola, in the State of Florida; Mobile in the State of Alabama; Gulfport, in the State of Mississippi and divers other ports and places within the United States to the grand jurors aforesaid unknown and at said named ports and places engaged in storing spirits of turpentine and rosin on yards and in tanks and issuing warehouse receipts against and representing said spirits of turpentine and rosin, making contracts for the storage thereof, and collecting therefor, and

that during all of said time said J. F. Cooper Myers was the president and chief executive officer of said National Transportation and Terminal Company, and the said C. J. De Loach was the Secretary and one of the principal executive officers of said National Transportation and Terminal Company, and the said Carl Moller was the manager of the Jacksonville, Florida, branch of said National Transportation and Terminal Company and an agent and employé thereof, and the said American Naval Stores Company; said National Transportation and Terminal Company, said Edmund S. Nash, said Spencer P. Shotter, said C. J. De Loach, said J. F. Cooper Myers, said George Meade Boardman and said Carl Moller, having already secured to themselves the control of more than half of the trade and commerce among the several states of the United States and with foreign nations in the aforesaid articles of commerce, did then and there, on said first day of May, in the year of our Lord one thousand, nine hundred and seven, wilfully, knowingly and unlawfully monopolize and attempt to monopolize a part of the trade and commerce among the several states of the United States and with foreign nations in the aforesaid articles of commerce, by the means, among other ways, as follows: by controlling, manipulating and arbitrarily bidding down and depressing the market and market prices of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices; by coercing and causing naval stores receipts which would normally and naturally flow to one port of the United States to be diverted to another port of the United

States; by purchasing thereafter at divers times a large part of
11 its supplies at naval stores ports known as closed ports, and willfully and with the deliberate intent and purpose of depressing the market refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basic of primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulport, and Mobile on the basis of the market at Savannah by coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts, and refusing to purchase from such factors and brokers unless such contracts were entered into by circulating and publishing false statements as to naval stores production and stocks in hands of producers and their immediate representatives; by issuing and causing to be circulated and hypothecated fraudulent warehouse receipts; by fraudulently grading, regarding and raising grades of rosins, and falsely gauging spirits of turpentine; by attempting to bribe employés of competitors and factors, so as to obtain information as to competitors' business and stocks; by inducing consumers by payment of bonuses and threats of boycott to postpone dates of delivery of contract supplies thus enabling defendants to refrain from purchasing such supplies, which purchasers would tend, if made, to strengthen the market and market prices; by making tentative offers of large quantities of naval stores under prevailing markets intending then and there to

accept and actually accepting only contracts for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers; by at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors; by willfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production; each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such trade and commerce among the several states and foreign nations in the aforesaid articles of commerce, and destroying competition and monopolizing trade in the aforesaid articles of commerce; contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States.

(Signed)

ALEXANDER AKERMAN,
Assistant U. S. Attorney.

12 [Indorsed on Back:] #346. United States Circuit Court, Eastern Division, Southern District of Georgia. The United States, vs. American Naval Stores Company, et al. Indictment for, conspiracy to restrain trade and commerce. Vio. Act July 2, 1890. A true bill, J. Clayton Clements, Foreman Grand Jury. Filed April 11th, 1908. T. F. Johnson, Clerk.

Plea.

The defendants waive arraignment and plead not guilty, in open court this 27th day of April, 1909.

W. W. MACKALL,
ADAMS & ADAMS,
GARRARD & MELDRIM,
Attorneys for Defendants.

Verdict.

We the jury find the defendants Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, Carl Moller, George Meade Boardman, guilty on first and second counts, and C. J. De Loach not guilty. So say we all.

E. P. NOYES, *Foreman.*

Savannah, Ga., May 10th, 1909.

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

The jury having returned a verdict of "guilty" against the defendant Edmund S. Nash, whereupon, it is considered, ordered and ad-

judged by the Court, that the said defendant Edmund S. Nash, pay a fine of three thousand (\$3,000.00) dollars and one-fifth of the cost of prosecution, to be taxed by the clerk, and that he be imprisoned in the common jail of Chatham County, Georgia, until said fine and costs be paid, or until he is otherwise discharged by law.

In open court this 14th day of May, A. D. 1909.

WM. B. SHEPPARD,

U. S. Judge.

Filed May 14th, 1909.

T. F. JOHNSON, *Clerk.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

The jury having returned a verdict of guilty against the defendant, Carl Moller, whereupon it is considered, ordered and adjudged by the Court, that the said defendant Carl Moller pay a fine of five thousand dollars (\$5,000.00) and one-fifth of the costs of prosecution, to be taxed by the Clerk, and that he be imprisoned in the common jail of Chatham County, Georgia, until said fine and costs be paid, or until he is otherwise discharged by law.

In open Court this the 14th day of May, A. D. 1909.

WM. P. SHEPPARD,

United States Judge.

Filed May 14th, 1909.

T. F. JOHNSON, *Clerk.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

The jury having returned a verdict of "guilty" against the defendant, George Meade Boardman, whereupon it is considered, ordered and adjudged by the Court that the said defendant, George Meade Boardman, pay a fine of two thousand (\$2,000.00) dollars and one-fifth of the costs of prosecution, to be taxed by the clerk, and that he be imprisoned in the common jail of Chatham County, Georgia, until said fine and costs be paid, or until he is otherwise discharged by law.

In open Court this 14th day of May, A. D. 1909.

W. B. SHEPPARD,

United States Judge.

Filed May 14th, 1909.

T. F. JOHNSON, *Clerk.*

In the Circuit Court of the United States for the Eastern Division
of the Southern District of Georgia.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

The jury having returned a verdict of "guilty" against the defendant Spencer P. Shotter, whereupon it is considered, ordered and adjudged by the court that the said defendant Spencer P. Shotter be imprisoned in the common jail of Chatham County for the term of three months; that he pay a fine of five thousand (\$5,000.00) dollars, and one-fifth of the costs of prosecution to be taxed by the Clerk, and that he remain imprisoned in said jail until said fine and costs be paid or until he is otherwise discharged by law.

In open Court this May 14th, A. D. 1909.

WM. B. SHEPPARD,

U. S. Judge.

Filed May 14th, 1909.

T. F. JOHNSON, *Clerk.*

In the Circuit Court of the United States for the Eastern Division
of the Southern District of Georgia.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

The jury having returned a verdict of "guilty" against the defendant, J. F. Cooper Myers, whereupon it is considered, ordered and adjudged by the Court, that the said defendant J. F. Cooper Myers, be imprisoned in the common jail of Chatham County, Georgia, for the term of three (3) months; that he pay a fine of two thousand, five hundred (\$2,500.00) dollars and one-fifth of the cost of prosecution, to be taxed by the Clerk and that he remain imprisoned in said jail until said fine and costs be paid or until he is otherwise discharged by law.

15

In open Court this May 14th, 1909.

WM. B. SHEPPARD,

United States Judge.

Filed May 14th, 1909.

T. F. JOHNSON, *Clerk.*

In the United States Circuit Court in and for the Eastern Division
and Southern District of Georgia.

UNITED STATES

VS.

AMERICAN NAVAL STORES COMPANY et al.

Indictment Found April 11th, 1908.

Conspiracy to Restrain Trade, &c.

And now come the Defendants in the above-stated cause, namely, the American Naval Stores Company, the National Transportation and Terminal Company, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, C. J. De Loach and Carl Moller, and, in response to the indictment in the said cause, found on the 11th day of April, 1908, and purporting to be based upon an Act of Congress approved July 2, 1890, entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies," and sayeth that the said indictment and the matters contained therein in manner and form as the same are above stated and set fourth are not sufficient in law, and that they are not bound by the law to answer the same, and, by way of demurrer, these defendants demur and object to the said indictment upon the following grounds, to-wit:

1. The Act of Congress upon which the said indictment purports to be based, is too vague, uncertain and indefinite to be the basis of a criminal prosecution and the provisions thereof looking to a criminal prosecution are, for this reason, inoperative and void.

2. Because the said Act is bad as a penal Statute, in that it undertakes to create a crime, and yet is not so explicit that all men, subject to its penalties, may know what Acts it is their duty to avoid, and the said Act contains no definitions or criteria by which the acts unlawful thereunder are defined or are ascertainable.

3. Because the said indictment, or any one of the three counts thereof, does not charge any offense against these Defendants or any of them.

4. The first count of the indictment is bad and Defendants demur thereto because it does not allege that any act of any kind was done by these defendants or any of them.

5. Defendants further demur to the said first count because it had been alleged that defendants, or any of them, did the acts or thing- mentioned in the count, no one of them would have constituted any offense under the law invoked by the Government.

6. Because the acts and things mentioned in the said first count, by which, it is charged, that the restraint of trade and commerce among the several States and foreign nations was to be effected, are stated with such vagueness and incompleteness as not to advise these defendants of the character of the charge.

7. Defendants demur to the second count of the indictment upon the grounds set fourth in the fourth, fifth and sixth grounds of this demur-er with reference to the first count, Defendants making to the second count the same objections.

8. Defendants demur to the third count of the indictment upon the ground that it undertakes to set forth, in the same count, two distinct offences, in that it charges that defendants monopolized and attempted to monopolize trade and commerce among the several States of the United States, and with foreign nations.

9. Defendants object to the said third count upon the further ground that it is duplicitous, and that it charges monopoly and attempt to monopolize.

10. Defendants further object to the said third count upon the ground that it is repugnant, in that it undertakes to charge the Defendants attempted to monopolize trade and also that, in point of fact, they did monopolize trade.

11. Defendants object to the said third count upon the further ground that it is repugnant, in that, in one part thereof, it charges these defendants with monopolizing and attempting to monopolize a part of the trade and commerce referred to, and, in another part, alleges that these defendants, having already secured to themselves the control of more than one-half of the trade and commerce referred to, did wilfully, knowingly and unlawfully monopolize and attempt to monopolize a part of such trade, and, in another part, charges a purpose of driving all competitors out of business and monopolizing all of the trade.

12. Defendants further object to the said third count, in that it is uncertain whether the third count charges that these defendants did monopolize any part of the trade and commerce mentioned by any of the means mentioned, or merely attempted to do so, and the third count is vague and indefinite as to this.

13. Defendants object to the said third count upon the further ground that no one of the means set forth in the said third count, by which it is charged that these defendants monopolized and attempted to monopolize the trade and commerce referred to, sets forth any offense of any kind under the statute.

14. Defendants further object to the said third count because it is not accompanied with such a statement of facts and circumstances as would inform these defendants of the offense alleged against them and does not furnish the defendants with such a description of the charge as will enable them to make their defense.

15. Defendants further object to the said third count upon the ground that the means which the said third count undertakes to set forth are so vaguely and imperfectly set forth as to be utterly without definiteness or specifcness as to time, place, circumstances or ingredients of the offense, and in no particular does it comply with the laws of pleading in such cases.

16. Defendants object to the said third count upon the ground that the statute invoked by the Government is intended to condemn combinations, contracts and conspiracies to monopolize trade and

18 commerce among the several States or with foreign nations, and this third count does not charge any combination, contract or conspiracy whatsoever, and charges different and separate defendants with the same offense in one count without connecting them by any allegation of combination or conspiracy.

17. Defendants object to the said third count upon the further ground that it undertakes to charge two corporations, namely, the American Naval Stores Company and the National Transportation and Terminal Company, and certain of their officers, although it appears in the said count that the National Transportation and Terminal Company is not engaged in trade of any kind and was not connected therewith in any way, and it is not alleged that it and its officers combined or conspired in any way with the American Naval Stores Company and its officers.

18. Defendants object to the said third count upon the further ground that no offense is set forth therein against the National Transportation & Terminal Company, and therefore against its officers, and nothing is said to show that the American Naval Stores Company and its officers violated any law, and it appears that they could not have done so, with the National Transportation & Terminal Company and its officers eliminated from the said count, as they ought to be.

19. Defendants further object to the said third count upon the ground that no monopoly or attempt to monopolize in any prohibited sense is set forth in the said third count.

20. The said indictment is bad in that it undertakes to make out of the same overt acts or specifications three distinct counts and a number of distinct offenses.

21. Defendants demur to each and every one of the specifications in the said three counts and to each of the said three counts, upon the ground that they are utterly lacking in fullness, specifiveness and definiteness as to time, place, circumstances, parties and description generally, and they do not in any of these particulars so advise the defendants as to give them an opportunity to prepare to meet such charges.

Wherefore, for these and other objections, defendants demur to the said indictment, and pray judgment dismissing the same, and that they may be hence discharged.

ADAMS & ADAMS,
W. W. MACKALL,
Att'ys for Def't.

Filed April 12th, 1909.

T. F. JOHNSON, *Clerk.*

19 *Judgment Striking Third Count of Indictment.*

In the United States Circuit Court in and for the Southern District of Georgia, Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY.

Indictment found April 11th, 1908.

Demurrers filed April 12, 1909.

In accordance with the opinion of the Court heretofore announced in the above stated cause, it is now considered, ordered and adjudged that the demurrer filed April 12th, 1909, be and the same is hereby sustained as to the third count of said indictment, and that the said third count be and the same is hereby stricken and dismissed.

In open Court this 19th day of April, 1909.

WM. B. SHEPPARD, *Judge.*

[Indorsed:] Filed April 19th, 1909. W. H. Godwin, Deputy Clerk.

Judgment Overruling Demurrer First and Second Counts.

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

THE UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Indictment No. —.

Vio. Act July 2, 1890.

The demurrer of the defendants in the above stated cause, upon both general and special grounds, to the above stated indictment, coming on to be heard by the Court by argument thereon by counsel for defendants and for the United States, and the same being considered by the Court:

It is now upon consideration ordered and adjudged by the Court that the said demurrer, upon each and all the grounds
20 thereof, be, and it is hereby overruled by the Court, insofar as said demurrer relates to the first and second counts of the said indictment.

Let the defendants plead over to the said first and second counts of said indictment.

In open Court, this 19th day of April, 1909.

WM. B. SHEPPARD,

U. S. Judge.

[Indorsed:] Filed April 19th, 1909. W. H. Godwin, Deputy Clerk.

Opinion of Court as to Demurrer.

In the Circuit Court of the United States for the Southern District of Georgia, Eastern Division.

THE UNITED STATES
vs.
AMERICAN NAVAL STORES Co. et al.

Demurrer to Indictment.

Opinion of Court.

Filed Apr. 17, 1909.

The demurrer to the indictment in this case raises both the question of the validity of the penal provisions of the Sherman or anti-trust act and the sufficiency of the indictment under sections one and two of said act. The questions raised by the demurrer, and so exhaustively and comprehensively discussed by counsel, orally and by brief, have caused anxious and earnest investigation from the Court. The statute has been a vexatious one to the Courts since it first came under judicial scrutiny, in *re Green*, 52 Fed., 104, in 1892.

Four times, so far as my investigation has disclosed, has the statute reached judicial consideration in criminal cases, and in none of these was the question of the uncertainty and indefiniteness of the penal provisions of the statutes brought equally before a Court as here. Not once has the Supreme Court passed upon this, perhaps, doubtful feature of the act, but a fair and reasonable interpretation of the decisions of that Court from the United States versus E. C. Knight Co., in 156 U. S., as early as 1895 down to the Danbury Hat case, 208 U. S.—a brief summary of them all is, 21 that they hold “that the act prohibits any combination whatever to procure action which essentially obstructs the free flow of commerce between the States or obstructs in that regard the liberty of a trader to engage in business.” It does not fail to interest the inquiring student, either, that in all of the important cases involving the construction of this act by that great Court, every section of it has been persistently assailed for uncertainty, ambiguity, absurdity and unconstitutionality.

It is, I conceive, no longer open to question or cavil by the inferior Federal Court, who must, of course, be guided by the construction of the Supreme Court. Said Justice Lacombe, speaking for the Court of Appeals, Second Circuit, in *United States versus American Tobacco Co.*, referring to the Sherman Act:

“Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language, as prohibiting any contract or combination whose direct effect is to prevent the free play of compe-

tion and thus tend to deprive the country of the services of any number of independent dealers, however small.

"As thus construed, the statute is revolutionary; by this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very life of trade, it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not a majority, of the community, and that it intended to secure such competition against the operation of natural laws."

It could accomplish no good purpose, as I see at this time, to enter upon a comprehensive review and comparison of the decisions of the inferior Federal Courts construing the penal provisions of the act. Suffice it to say that the well reasoned case decided by Judge Jackson, which I would be inclined to follow if the statute had not reached the Supreme Court, who undertook to define the scope of the act and what were criminal monopolies, and what constituted restraint of trade and the sufficiency of an indictment within the purview of the statute, was long prior to the decision of the Supreme Court in the Swift case, the Northern Securities and the Joint Traffic Association cases. In view of the construction of the statute made in these cases, it is not improbable that Judge
22 Jackson's decision in *re Green* and Judge Nelson's decision in *Greenhut v. United States* and Judge Rick's in *re Corning* would be different.

Insofar as the application of the provisions of the statute denouncing as criminal combinations and conspiracies in restraint of trade and monopolies and attempts at monopolies and attempts to monopolize, I am impelled, after some hesitancy and much inquiry, to the ultimate conclusion that until that question is brought squarely before the Supreme Court, it would be safer to follow the precedents established in *United States v. Patterson, et al.*, 56 Fed. R., 605, and *McAndrews, Forbs Company v. United States*, 145 Fed., 323.

Judge Hough of the Southern District of New York overruled a demurrer to an indictment, charging violation of sections 1 and 2 of the Sherman Act, and held, among other definitions of the act, that:

"Whether any given business scheme falls within the anti-trust law as a combination or conspiracy in restraint of trade, or an attempt at monopoly of a portion thereof, it is to be determined by its effect on interstate commerce, which need not be a total suppression of trade or interstate commerce, nor a monopoly, but it is sufficient if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantages flowing from free competition."

Again, the criminal provisions of the statute received comprehensive treatment from Circuit Judge Putnam, in the case of *Patter-*

son v. United States, 55 Fed., 605. The case was most exhaustively argued by counsel in which almost every conceivable objection that could be raised to the application of the first two sections of the act were insisted upon, yet the learned Judge said: "I do not think there is any constitutional question in this case, upon any view of this statute or upon the face of the indictment."

"The right of free commerce granted by the Constitution permits broad legislation; and in no sense is this statute as broad as the revised statute section 5508 on the principal construction pleaded later in United States v. Waddell."

"There may be practical difficulties in applying the statute in such a way as to prevent conflicts with the state jurisdiction. Ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and, therefore, it is necessary, ordinarily, to declare the means by which it is intended to engross or monopolize the market."

The Court does not feel embarrassed by the use of the words "trade and commerce." And then the learned Judge goes on
23 to point out the specific offenses denounced by the first two sections of the Act, and further on defines the purpose of Congress in this legislation.

Can it be said in view of these decisions that the act, as far as it applies to criminal combinations and conspiracies, should be lightly brushed aside because of its apparent unreasonableness and absurdity, or would it best comport with the due administration of justice to hold its penal provisions effective as against those conspiracies and combinations which are shown by requisite proof to be destructive of the public welfare? It has been asserted by text writers to be incapable of enforcement because its application would destroy honest enterprise and thrift; perhaps this is an unfounded apprehension.

There are valid statutes incapable of application in all cases to the letter, notably the Trinity Church case, as Blackstone illustrated it, with the law of Bologna, which prohibited the shedding of blood in the streets of the city, but when a man fell with a fit and had to be lanced as a remedy, no one ever thought by doing so that the law was violated.

I have considered the indictment in the light of the constitutional requirement that the accused must be informed of the nature and cause of the accusation against him, and the indictment must impart to him, not only all the elements of the offense, but they must be stated in the indictment with clearness and certainty, so as to make the defendant reasonably to understand the act and particular transaction touching which he must be prepared with his proof. The rule is, in prosecutions for offenses against the laws of the United States, the indictment must charge more than the language of the statute upon which it is founded. However, it appears that to some extent that this necessity must be governed by the particular facts and circumstances of each case.

It has been held that the test of the sufficiency of the charging or descriptive part of an indictment is not that it might be fuller

and more certain, but whether it charges enough to put the defendant on notice of what he may expect to meet in the proof. Without critically reviewing the indictment, the first count charges that the defendant conspired in the usual form of a conspiracy charge, and then proceeds to describe with some detail how they were engaged in interstate trade and commerce and the character of the trade points and places, the relation of the officers to the corporation, and then follows a description of the means and ways of effecting the conspiracy.

The second count charges a conspiracy to monopolize and describes in like manner how the monopoly was to be effected, 24 and the general scheme of effecting the objects of that conspiracy. I am of the opinion that these counts charge sufficiently the offense of conspiracy to put the defendant on notice of the nature of the accusation. But the third count is a more difficult proposition. It is very doubtful whether by the use of the generic term monopolize and what follows as a description of the offense in this count is sufficient to meet the requirements as laid down in the Cruikshank and Hess cases. As pointed out by Justice Holmes, the statute intends to create two distinct and different offenses, by monopolizing and attempting to monopolize.

It is elementary that two separate offenses cannot be included in one count of an indictment. Besides, it is important that the defendant should know whether the government will proceed to prove that the defendants monopolized or attempted to monopolize. I think there is clearly a distinction between the two, and although there is not different punishment provided, the count is bad for duplicity and for lack of certainty.

[Indorsed:] Filed April 17, 1909. T. F. Johnson, Clerk.

Bill of Exceptions to Judgment Overruling Demurrer.

In the Circuit Court of the United States for the Southern District of Georgia, Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Indictment Found April 11, 1908.

Be it remembered, that in the above stated cause, in this the United States Circuit Court in and for the Southern District of Georgia, and Eastern Division, at the April Term, 1909, of said Court, the Honorable William B. Sheppard, Judge presiding, the above stated cause was, on the 12th day of April, 1909, called and the defendants filed a demurrer to the said indictment, consisting of twenty-one grounds. This demurrer was argued and taken under advisement by the presiding Judge, and afterwards, to-wit: on the 19th day of April, 1909, the said Judge rendered a decision over-

25 ruling the demurrer so far as the first and second counts of the indictment are concerned and sustained it as to the third, and then and there the said defendants excepted to the judgment of the Court overruling the said demurrer as to the said first two counts and had the exceptions noted.

And now in furtherance of justice and that right may be done the defendants, and before pleading, all of the defendants and demurrants tender and present this bill of exceptions in the case to the action of the Court, and state that the said judgment of the Court overruling the said demurrer is contrary to law, and that the said demurrer to the said first two counts ought to have been sustained upon grounds numbers 1, 2, 3, 4, 5, 6, 7, 20 and 21 of the said demurrer. And they pray that the same be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done.

This the 19th day of April, 1909.

WM. B. SHEPPARD, *Judge*.

[Indorsed:] Filed April 19th, 1909. W. H. Godgin, Deputy clerk.

Motion for a Bill of Particulars.

In the United States Circuit Court for the Southern District of Georgia, Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY, NATIONAL TRANSPORTATION and Terminal Company, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, C. J. DeLoach, and Carl Moller.

Indictment Found April 11, 1908.

And now come the defendants in the above stated cause, and, subject to their demurrer heretofore filed, which is respectfully insisted upon, and also to the plea in abatement filed by one of the defendants, and pray the Court that they be furnish[ed] a bill of particulars that will inform them of the charges made and enable them to prepare their case, the defendants being unable, from the generality of the indictment, reference being had to both counts, to-wit: counts one and two, duly to prepare themselves for defense, that is to say:

26 1. As to the first specification that the conspiracy alleged was to be effected "by controlling, manipulating and arbitrarily bidding down and depressing the market and market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices." Defendants ask that the bill of particulars specify when and where this was to be accomplished, and by what means, and what prices are meant as "ruinous prices," and through what servants or agents

of these defendants these things, or any of them, were done or intended to be done; also that the bill of particulars state what competitors and producers are meant, giving their names.

2. Touching the second specification, which reads "by coercing and causing naval stores receipts which would normally and naturally flow to one port of the United States to be diverted to another port of the United States;" it is desired to know what ports are meant and what means of coercion alleged to have been used by defendants are intended to be charged, and the parties coerced; also the time and place of the alleged coercion, and also what receipts it is meant flowed to one port of the United States, and when said receipts flowed, stating whether the receipts were spirits of turpentine, or rosin, or both, and the quantities of either or both.

3. Touching the third specification, reading "by purchasing thereafter at divers times a large part of its supplies at naval stores ports known as closed ports, and wilfully and with the deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basic or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on a basis of the market at Savannah." Defendants desire the bill of particulars to show when and where these things were done and what quantity of its supplies were purchased and at which of said closed ports.

4. Touching the fourth specification, reading "by coercing factors and brokers into entering into contracts with said defendants for storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into." Defendants desire the bill of particulars to give the names of the factors and brokers alleged to have been coerced, when and where the alleged acts of coercion were committed; the contracts alleged to have been entered into; between whom made and when made and whether in parol or in writing, and if in writing to *attached* [attach] said written contracts or copies thereof, or to inform these defendants of the substance of said contracts whether the same were in parol or in writing. Also the names of the factors and brokers from whom it is alleged these defendants purchased.

5. Touching the fifth specification: "by circulating and publishing false statements as to naval stores production and stock in hands of producers and their immediate representatives," these defendants demanding a bill of particulars setting forth what were the alleged false statements, and wherein they were false, when and where they were circulated and published; by whom circulated and published. If in writing that said statements, or copies thereof, be furnished to the defendants.

6. Touching the sixth specification: "by issuing and causing to be circulated and hypothecated fraudulent warehouse receipts," these defendants demanding to be informed when, where and by whom

and with whom said warehouse receipts are alleged to have been circulated and hypothecated, or intended to have been circulated and hypothecated; wherein said receipts were fraudulent, and to be furnished with copies of said receipts, or the substance thereof.

7. Touching the seventh specification: "by fraudulently grading, regrading and raising grades of rosin, and falsely gauging spirits of turpentine," these defendants demanding to be informed when, where and by whom said alleged fraudulent grading was done, and when, where and by whom the grades of said rosin were regraded and raised, and when, where and by whom the spirits of turpentine were falsely gauged, and wherein the fraud consisted in grading, regrading and raising said grades of rosin, and wherein the gauging of said spirits of turpentine was false.

8. Touching the eighth specification: "by attempting to bribe employes of competitors and factors so as to obtain information as to competitors' business and stocks," these defendants desiring
28 to be informed who attempted to bribe employes of competitors and factors; when this attempt was made; what employes of competitors and factors are meant and who the competitors in business are to which reference is had.

9. Touching the ninth specification: "by inducing consumers by payment of bonuses and threats of boycott to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices," these defendants desiring to be informed who were the consumers that these defendants are alleged to have induced; what bonuses were paid and when paid, to whom paid and by whom paid; what threats of boycott were made, when made, where made, to whom made and by whom made, and of what the bonuses consisted. These defendants desire to be further informed what contracts there were under which supplies were to be delivered; when made, with whom made, and whether in parol or in writing, and that copies of said contracts or the substance thereof may be furnished to these defendants. What were the dates of delivery, and to what dates said deliveries were postponed and to what parties said deliveries were to be made.

10. Touching the tenth specification: "by making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases to be made on the market thus depressed by the aforesaid fraudulent offers," these defendants desire to be informed what offers and sales were made, when made, where made, to whom made and by whom made; what quantities of naval stores were thus offered and sold and what was the prevailing market at the time of the alleged offers and sales.

11. Touching the eleventh specification: "by at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors," these defendants desire to be informed at what time and place and to whom they sold spirits of turpentine and rosin at prices

far below the actual cost to themselves and the prices for which said sales were made and the actual cost of the spirits to these defendants.

12. Touching the twelfth specification: "by wilfully and
29 arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production," these defendants desire to be informed what was the price of spirits of turpentine alleged to have been fixed by these defendants in the United States, and what was the cost of production, and what were the means used by these defendants in fixing the price of spirits of turpentine in the United States below the cost of production, and when and where these means were used.

These defendants demand to be informed who was the officer, agent, or employé, or, if name is unknown, the office or position of said officer, agent or employé of the defendant corporations, who is charged with doing or intending to do any of the things averred to have been done or intended to have been done by these defendant corporations or either of them. This demand includes furnishing to these defendants a bill of particulars in the particulars hereinbefore set out whether the matters and things averred were done or intended to have been done by these defendants, or any of them.

W. W. MACKALL,
ADAMS & ADAMS,
GARRARD & MELDRIM,
Att'ys for Def'ts.

In the U. S. Circuit Court for the Southern District of Georgia,
Eastern Division.

UNITED STATES
vs.
AMERICAN NAVAL STORES COMPANY et al.

Indictment Found April 11, 1908.

GEORGIA,
Chatham County:

Personally appears Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, C. J. De Loach and Carl Moller, who having been duly sworn depose and say that from the generality of the indictment in the above stated cause they are unable duly to prepare themselves for defense, that they are not sufficiently informed of the matters to be proved against them, and that a bill of particulars is material and necessary, and that the foregoing demand is in good faith for the purpose of obtaining the de-
30 sired information and is not for delay. That Edmund S. Nash is president of the American Naval Stores Company, and J. F. Cooper Myers is president of the National Transportation and Terminal Company of New Jersey, and that the said Edmund S. Nash and the said J. F. Cooper Myers are authorized to act on

behalf of their said corporations and do so in their behalf as well as individually.

EDMUND S. NASH.
EDMUND S. NASH, *As Pres't.*
SPENCER P. SHOTTER.
C. J. DE LOACH.
J. C. MYERS, *As Pres't.*
J. F. C. MYERS.
CARL MOLLER.
GEO. M. BOARDMAN.

Sworn to and subscribed before me this 19th day of April, 1909.
NEYLE COLQUIT,
Notary Public, Chatham County, Georgia.

[Indorsed:] Filed April 20th, 1909. W. H. Godwin, Deputy Clerk.

Order Requiring Bill of Particulars.

In the Circuit Court of the United States for the Eastern Division
of the Southern District of Georgia, Savannah, Georgia.

THE UNITED STATES OF AMERICA
vs.
AMERICAN NAVAL STORES Co. et al.

Order.

This cause coming on to be heard upon the application of the defendants, for a bill of particulars more definitely and specifically describing and setting out the acts, doings, means and conduct of the defendants affecting the alleged conspiracy charged in two counts of the indictment, and upon consideration thereof, it is ordered:

That the United States Attorney prepare and furnish to the counsel of the defendants a bill of particulars as follows:

31 1. With reference to the first specification referring to manipulation and arbitrarily bidding down the market; state place where this was done, and who, as competitors, were affected by the reduced prices. And if by agents, the character or employment of such agents.

2. With reference to the second specification; give character of agents' employment or office by whom naval stores receipts were coerced or diverted from one port to another, and the name or names of the ports diverted to, and diverted from, respectively. And whether it was rosin, spirits or turpentine, or both, that was diverted.

4. With reference to the fourth specification give the names of factors and brokers alleged to have been coerced or from whom stocks were brought, or as many as known and where. And the nature of such contracts entered into, with whom, or as many as known.

And whether parol or documentary evidence be relied on to *sustained* [sustain] such allegations.

5. With reference to the fifth specification; give the substance of the alleged false statements, when and where they were circulated, whether by defendants or their agents, and the nature and character of such agents' office or employment. And the manner of their publication.

6. With reference to the sixth specification; give the substance or character of alleged warehouse receipts issued, by whom, where or how issued or hypothecated; and whether printed or written and furnished if in your possession an exemplification of same.

7. With reference to the seventh specification; state what place or places and time the alleged practices of falsely grading or regrading, raising grades or falsely gauging spirits were carried on. How accomplished, if by the defendants' agents what position did they occupy or the character of their employment.

8. With reference to the eighth specification; name competitors in business or some of them, and the names of employes or some of them, who were approached with bribes and the names of such persons attempting to bribe, and where.

9. With reference to the ninth specification; the names of 32 consumers or as many as known, to whom bonuses were offered, and to whom threats of boycott were made, or as many as known, and if by agents of the defendants then their office, position or the character of employment of such agents. Brief description of contracts for such deliveries, and with whom made, if known, if in the possession of such contracts attach description, substance or exemplification of same.

10. With reference to the tenth specification; describe more particularly the alleged tentative offers of naval stores, name some of the offers, and by whom made, and where such offers were made.

11 & 12. With reference to the eleventh and twelfth specifications; give names of some places and times where described naval stores were sold below cost of production, by whom sold, if by agents, position or office of such agent-, and how said prices, in such places, were affected by the defendants.

Done and ordered in open Court at Savannah, Ga., this 22nd day of April, A. D. 1909.

WM. B. SHEPPARD,
United States District Judge.

[Indorsed:] Filed April 22nd, 1909. W. H. Godwin, Deputy Clerk.

Bill of Particulars.

In the Circuit Court of the United States for the Southern District of Georgia, Eastern Division.

THE UNITED STATES OF AMERICA
vs.
AMERICAN NAVAL STORES COMPANY et al.

Now comes the United States of America by Alexander Akerman, Assistant United States Attorney, and W. M. Toomer, Special Assistant United States Attorney, who appear and prosecute for the United States in this behalf, and in accordance with the order of the Court, filed in the above entitled cause on the 22nd day of April, 1909, requiring the United States Attorneys to file a bill of particulars in said cause, submit and file the following bill of particulars:

33 First. The government expects to show that the controlling, manipulating and arbitrarily bidding down and depressing the market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce, except at ruinous prices, was done at Savannah, Georgia; Jacksonville, Florida; New York, N. Y.; London and Liverpool, England, and Hamburg, Germany, and at divers other places, at this time to the Assistant United States Attorneys unknown. The competitors affected by prices thus reduced were the J. R. Saunders Company, Pensacola, Florida; John A. Casey Company, New York, N. Y.; James Conner & Sons, Baltimore, Md.; Paterson Export Company, Jacksonville, Florida, and divers other persons at the present time to the Assistant United States Attorneys unknown. That the aforesaid manipulating, bidding down and fixing of prices was done by Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, Carl Moller, George Meade Boardman, Harry H. Bruen, and divers other persons, who were agents and employes of the American Naval Stores Company and subsidiary corporations; the names of whom and the exact nature and character of their agency and employment, at the present time, to said Assistant United States Attorneys are unknown.

Second. The government expects to prove that the diversion of naval stores receipts referred to in the second paragraph of the Court's order, was forced and coerced from the ports of Fernandina and Jacksonville, Florida, and Brunswick, Georgia, to the port of Savannah, Georgia, and that this was done by the defendants themselves and by divers agents of American Naval Stores Company and National Transportation and Terminal Company, at this time to the Assistant United States Attorney unknown. Further, that the naval stores thus diverted included both spirits of turpentine and rosin.

Fourth. The government expects to prove under specification number four of the Court's order, that the factors and brokers referred to were the Consolidated Naval Stores Company, West Flyn & Harris Company and divers other factors and brokers, at this time to the

Assistant United States Attorneys unknown. Both parol and documentary evidence will be relied on by the government. The contracts relied on by the government, in substance, required the storage of naval stores receipts of such factors and brokers at naval stores terminals, owned, controlled or operated by the National Transportation and Terminal Company. Duplicates of these contracts, the government is advised, are now in the possession
34 of the defendants.

Fifth. The government expects to prove under the fifth specification of the Court's order, that false statements were made by the defendants themselves as to the stock of naval stores unsold in the hands of producers or their immediate representatives; that is to say, that the defendants inspired and caused to be published in the Naval Stores Review, and various other trade organs, at this time to the Assistant United States Attorneys unknown, and circulated throughout the naval stores trade, in various issues of those trade organs, statements grossly exaggerating the quantity of spirits of turpentine in the hands of producers or their immediate representatives, and in storage in Savannah, Georgia, and Fernandina and Jacksonville, Florida.

Sixth. Under the sixth specification of the Court's order, the government expects to show that the warehouse receipts referred to were, in substance and character, receipts issued by the National Transportation and Terminal Company for naval stores falsely claimed to be in its custody at Tampa, Fernandina, and hypothe-
cated with the banks at Jacksonville, Florida; that said warehouse receipts were partly printed and partly written. No such receipts are in the possession of the government, or exemplifications of the same, but it is believed by the government that these receipts are in the possession of the defendants, or have been by them destroyed.

Seventh. Under the seventh specification of the Court's order, the government expects to prove that the practice of falsely and fraudulently raising the grades of rosin, without re-inspection, was carried on at Brooklyn, New York, Hamburg, Germany; Tampa, Florida; Jacksonville, Florida; Ludlow, Kentucky; East St. Louis, Illinois, and divers other places at this time to the Assistant United States Attorneys unknown. This grading up of rosins, the government expects to show was done by employes of the National Transportation and Terminal Co. and American Naval Stores Company, acting under the direction of the respective managers of said companies' terminals at the points named, and by divers other agents and servants of all of said defendants, the exact names and character of said agencies being at
this time to the Assistant United States Attorneys unknown.

35 Eighth. Under the eighth specification of the Court's order, the government expects to prove that some of the competitors in business, whose employes were attempted to be bribed, were the John R. Young Company and the Naval Stores Export Company, and that the names of some of the employes of said competitors who were approached with bribes were F. H. Holloway, Harry Manucey and William Thomas; that the names of the per-

sons attempting to bribe the above named employés of said competitors were A. C. Bacon, Henry Betjeman and Percy Bacon, and that these attempted briberies occurred at Tampa, Florida; Fernandina, Florida, and Brunswick, Georgia; that the government, in this connection, expects to show the attempted bribery of divers other employés of divers other competitors by divers other agents and employés of the defendants at divers times and places, at this time to the Assistant United States Attorneys unknown.

Ninth. Under the ninth specification in the order of the Court, the government expects to prove that for the postponement of deliveries while the defendants were depressing the market Lilly Varnish Company of Indianapolis, Ind.; Gesellschaft Schering, of Berlin, Germany, and Conrad William Schmidt, Dueseldorf, were offered bonuses, and in order to force the postponement of deliveries at such times Ernest C. Bartels, Aektien Gesellschaft, Hamburg, Germany, was threatened with boycott. Payment of bonuses and threats of boycott were made to and against divers other consumers to the Assistant United States Attorneys at this time unknown. The payment of said bonuses and the threats of boycott were made by the defendants, and by their special agent, E. S. Trosdal, and the manager of the Cincinnati, O., branch office of the American Naval Stores Company and by other agents and representatives whose names and exact relations to said defendant are to the Assistant United States Attorneys unknown. The government is not in possession at this time of the contracts described in said specification, except the contract between the American Naval Stores Company and Lilly Varnish Company, copy of which, in substance, is as follows:

Dates February 12th, 1907.

American Naval Stores Company, Chicago, Ill.

Sold to Lilly Varnish Co., Indls., Ind. Freight prepaid to Indls., Ind. Ship via Penna. Co. when ordered. Terms sight draft with bill of lading attached, upon shipment of goods. This order not subject to cancellation.

36 — bbls. — Rosin, — per 283 lbs. 2-6500 gal. tanks, turpentine, to be billed at flat Savannah freight paid to Indls. These tanks to be taken before Dec. 31, 1907. Sight draft B. of L. attached. American Naval Stores Co. by W. E. Holmes. Accepted Chas. Lilly.

but it is advised and believes that the defendants have in their possession duplicates of these contracts.

Tenth. Under the ten[th] specification in the Court's order, the government expects to prove tentative offers of spirits of turpentine made to Ernest C. Bartels, Aektein Gesellschaft, Hamburg, Germany, by the following representatives of American Naval Stores Company, to-wit: The American Pine Products Company and Hugo Wirtz, and divers other tentative offers of naval stores made

by the American Naval Stores Company to parties and at places at this time to the Assistant United States Attorneys unknown.

Eleventh and Twelfth. Under the eleventh and twelfth specifications in the order of the Court, the government expects to prove that in the months of November and December, 1907, the American Naval Stores Company, at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by the manager of the New York City office of the American Naval Stores Company, and at Philadelphia, Pa., by the manager of the Philadelphia branch office of the American Naval Stores Company, and divers other sales made at divers other places and on divers other times to consumers and by representatives of the American Naval Stores Company, at this time to the Assistant United States Attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market at those times depressed below the cost of production by the defendants by the various means and in the manner specified in the first and second counts of the indictment.

This bill of particulars is submitted respectfully as a compliance with the order of the Court in the premises and with the right reserved to and prayed by the government to introduce any evidence which would have been competent under the allegations in the bill of indictment had this bill of particulars not been

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demand and ordered.

ALEXANDER AKERMAN,

Assistant U. S. Attorney.

W. M. TOOMER,

Special Ass't U. S. Attorney.

[Indorsed:] Filed April 24, 1909. W. H. Godwin, Deputy Clerk.

Further Order of Court as to Bill of Particulars.

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

It is further ordered in the above entitled cause that the District Attorney of the United States further respond to the order of the Court heretofore made by furnishing a further bill of particulars as to the sixth specification, to-wit:

By naming the banks, if known, through which false receipts were hypothecated, time issued, if not known, then allege time between designated dates within the statutory limitation.

As to the seventh specification, to-wit:

Specify time when alleged marking down and marking up of

rosin or turpentine, which, otherwise during what period time this was carried on between designated dates.

It is further ordered that the District Attorney comply with this order with all reasonable dispatch.

That the application for a further bill of particulars on the other specifications heretofore requested is hereby denied.

Done and ordered at Savannah, Ga., this 24th day of April, A. D. 1909.

WM. B. SHEPPARD, *Judge*.

[Indorsed:] Filed this 24th day of April, A. D. 1909. W. H. Godwin, Deputy Clerk.

38 *Response of U. S. on Order for Bill of Particulars.*

In the Circuit Court of the United States, Eastern Division, Southern District of Georgia.

UNITED STATES GOVERNMENT

vs.

AMERICAN NAVAL STORES COMPANY et al.

Come now Alexander Akerman, Assistant United States Attorney, and W. M. Toomer, Special Assistant United States Attorney, and in response to the further order of the Court, dated the 24th day of April, 1909, in the matter of the bill of particulars, and answering say:

Under the sixth specification of the Court's original order the government names the Florida National Bank, and Atlantic National Bank, both of Jacksonville, Florida. The time was on divers days between May 1st, 1907, and April 1st, 1908, the exact dates being unknown at this time by the Government.

Second. As to the seventh specification of the Court's original order, the government expects to show the fraudulent grading up of rosin and false gauging of turpentine carried on each month and almost continuously day by day from May 1st, 1907, to April 1st, 1908.

Respectfully submitted, April 24th, 1909.

ALEXANDER AKERMAN,
Assistant United States Attorney.
W. M. TOOMER,
Special Ass't United States Attorney.

Copy of above received this April 24th, 1909, 5:15 P. M.

ADAMS & ADAMS, *Att'ys.*

[Indorsed:] Filed April 24th, 1909. W. H. Godwin, Deputy Clerk.

Opinion of Court on Motion to Direct Verdict.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Opinion Overruling Motion to Direct Verdict.

The Court is at this time asked to direct a verdict for the defendants on the testimony so far adduced.

To grant such a motion would be virtually to hold that there was no evidence connecting any of the defendants with the material points in the case which is the conspiracy charged in the indictment. Owing to the distressing uncertainty of the penal sections of the act under which this prosecution is maintained, it is difficult to say what acts or conduct would come within the purview of the statute. Yet the law as prescriptive legislation has been many times sustained by the highest Court in the land. Just what acts or conduct may amount to a violation of sections one and two of the act or what facts or circumstances would legally incur the penalties thereof may indeed be a doubtful legal problem.

If I could bring myself clearly to the view so earnestly maintained by counsel, namely, that it is essential to a conviction of the offense charged in the indictment to establish each and every of the means set out in the indictment for the accomplishment of the alleged conspiracy, the task would be easy. Some of the means to effect the conspiracy charged in the indictment have not, in my opinion, been sustained by the testimony. But what is the real offense charged in the indictment and with which we are dealing? It is a conspiracy, perhaps, modified from statutory conspiracy by the other definitive terms of the act, but conspiracy is what is charged and attempted to be shown here.

A conspiracy to commit a substantive offense, it may be conceded, is susceptible of proof by evidence which would wholly fail to make out the ultimate or substantive offense. The existence of a conspiracy, as so often repeated, may be shown by circumstances and the circumstances may not train in connected form; but if they are of such a nature to convince a jury that they would not have occurred except as the result of some previous understanding, it has been generally sufficient in point of evidence if such circumstances are so strong as to satisfy the jury beyond a reasonable doubt.

Has there been any evidence of the material facts involving
 40 any two or more of the defendants? Should the failure to prove some one or more of the means alleged to effect the conspiracy justify the Court in taking the case from the consideration of the jury? Notwithstanding there may be other circumstances on which a jury may be competent to pass, and which if considered by a jury might satisfy their minds of a previous agreement between some of the defendants; and that too without regard to any showing that there was in fact any restraint of commerce if only

such means were adopted as would directly or immediately tend to that result.

The motion interposed at this time, it may be said for the purpose made, admits the truth of all that has been so far adduced and all the reasonable inference which a jury might draw therefrom. I am not prepared to say that there could be but one deduction as to any of the defendants from all the evidence, scattering and circumstantial as it is.

Preferring then, the view that it is not required of the prosecution to prove that all the means set out in the indictment were in fact agreed upon as to the way of effecting the alleged conspiracy, and further that the primary object of the law is to protect trade and commerce against unlawful restraints, the question of inquiry is whether the facts and circumstances, if true, would tend directly to such restraint of this comparatively limited commodity between the States and foreign countries; and if so, do the certain acts and circumstances admitted point to any previous concert among any two or more of the defendants to compass such a result.

With the lights before me, it would best subserve the ends of justice to leave the issue to the judgment of twelve men, with whatever peremptory instruction I made [may] conclude to give the jury as to some of the defendants.

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Motion in Arrest of Judgment.

In the United States Circuit Court for the Eastern Division of the Southern District of Georgia, April Term, 1909.

UNITED STATES

vs.

AMERICAN NAVAL STORES CO. et al.

Conspiracy to Restrain Trade, Etc.

Verdict Rendered May 10th, 1909.

And now, during the above April Term of said Circuit Court and before the pronouncing of judgment on the verdict, come the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, against whom a verdict was rendered on the 10th day of May, 1909, in the above stated cause, during the present April Term, and move in arrest of judgment in the said cause upon the following grounds, to-wit:

1. The verdict rendered is incomplete and void and no valid judgment can be entered up thereon, in that these five defendants and three other defendants were jointly indicted and jointly tried and the verdict rendered found these five defendants guilty, found C. J. DeLoach, another defendant, not guilty, and made no finding, return or report of any kind as to two of the defendants indicted and tried with these defendants, namely, the American Naval Stores Com-

pany and the National Transportation and Terminal Company, corporations named in the said indictment as parties defendants.

2. Because, as appears by the record in this case, the jury impanelled in said cause was discharged without agreeing upon a verdict as to all of the defendants and without reporting that they were unable to agree and without giving or assigning any reason for not agreeing as to the said defendants, the two corporations indicted, and no valid judgment can now be entered up on the said verdict as to these five defendants or any of them.

3. Because no one of these five defendants could be found guilty as to either the first or second count of the indictment with no finding as to either of the corporate defendants named in the said indictment, all of these defendants being alleged in the indictment to be officers or agents of the American Naval Stores Company and two of these defendants, namely J. F. Cooper Myers and Carl Moller, being also alleged to be connected with the National Transportation and Terminal Company, as stated in the indictment, and these defendants and all of them being charged with conspiracy to restrain trade and conspiracy to monopolize trade for and in behalf of the only trader mentioned in the indictment and the only party alleged to be connected with interstate or international commerce, namely, the American Naval Stores Company, and they cannot be found guilty with the corporations eliminated from the case, particularly the American Naval Stores Company.

Wherefore defendants pray that judgment may be arrested and no judgment be pronounced on the said verdict.

W. W. MACKAL,
ADAMS & ADAMS,
GARRARD & MELDRIM,
Att'ys for Def'ts.

STATE OF GEORGIA,
Chatham County:

Personally came Edmund S. Nash, one of the five defendants named in the foregoing motion in arrest of judgment, who, being duly sworn, deposes and says that the jury impanelled in the said cause retired to their jury room, after supper, for the purpose of deliberating on their verdict about 8:15 of the evening of May 10th, 1909, and brought their verdict into Court about 10:45 of the same night, and the jury thus deliberating two hours and thirty minutes. Deponent says that the said jury made no report or return to the Court of any kind as to the two defendants, the American Naval Stores Company and the National Transportation and Terminal Company named in the said indictment, but ignored in the said verdict. The said jury did not express or indicate that they were unable to agree as to either of said two corporate defendants, or had disagreed in regard to either of said two corporate defendants, or either of them, or had considered the case as to the said two corporations or either of them, and were discharged without being interrogated as to either of the said corporate defendants.

EDMUND S. NASH.

Sworn to and subscribed before *be* this 12th day of May, 1909.
E. S. ELLIOTT,
Notary Public, Chatham County, Georgia.

43 Copy of this motion received this May 12th, 1909.
ALEXANDER AKERMAN,
Ass't U. S. Attorney.

[Indorsed:] Filed May 12th, 1909. T. F. Johnson, Clerk.

Motion to Dismiss Motion in Arrest of Judgment.

In the United States Circuit Court for the Eastern Division of the
Southern District of Georgia.

THE UNITED STATES
vs.
AMERICAN NAVAL STORES Co. et al.

Indictment for Conspiracy, Etc.

Now come the United States of America by Alexander Akerman, Assistant United States Attorney, and moves the Court to strike the motion in arrest of judgment and each and every ground thereof, filed by the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, and Carl Moller, for the reason that neither said motion as a whole, nor any ground thereof, states any reason in law why judgment should be arrested.

Wherefore, the United States pray that said motion be stricken and judgment entered on the verdict.

ALEXANDER AKERMAN,
Assistant United States Attorney.

[Indorsed:] Filed May 12th, 1909. W. H. Godwin, Deputy Clerk.

44 *Order on Motion in Arrest of Judgment.*

In the United States Circuit Court for the Eastern Division of the
Southern District of Georgia, April Term, 1909.

UNITED STATES
vs.
AMERICAN NAVAL STORES Co. et al.

After argument of counsel and consideration by the Court, it is ordered that the foregoing motion in arrest of judgment be and the same is hereby overruled.

In open Court, this May 14th, 1909.

WM. B. SHEPPARD, *Judge.*

Assignment of Errors.

In the United States Circuit Court for the Southern District of Georgia, Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Conspiracy to Restrain Trade, Etc.

Indictment Found April 11th, 1908.

And now come the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, by their attorneys at law, convicted by the verdict rendered May 10th, 1909, in the above-stated cause, and file the following assignment of errors upon which they and each of them rely upon the prosecution of the writ of error in the above-entitled cause:

1. That the presiding Judge in the said Circuit Court, in and for the Southern District of Georgia and Eastern Division, erred in overruling the demurrer filed by these defendants in the said cause upon the twenty-one grounds mentioned therein as to the
45 first and second counts in the said indictment, and erred in not dismissing the said first and second counts upon the said demurrer.

2. That the said presiding Judge erred in sustaining the motion of the government to strike the plea in abatement filed by the defendant called, in the indictment, the National Transportation and Terminal Company, the correct name of which is the "National Transportation and Terminal Company of New Jersey."

3. Because the Court erred in overruling the motion of these defendants to direct a verdict in their favor at the conclusion of the evidence of the government,—this motion being based upon the contention that the evidence did not warrant a submission of the case to the jury and demanded a finding in favor of defendants.

4. Because the Court erred in overruling the motion of the defendants, made at the conclusion of the entire evidence, for and in behalf of said defendants and each of them, to direct a verdict in their favor and in favor of each of them—this motion being based upon the contention that no case had been made out against them and the jury was not warranted in finding against them or any of them.

5. Because the said Court erred in refusing to give to the jury the following written instruction requested by these defendants before the charge began, to-wit: "The government has failed to make out, by legal evidence, a case against any of the defendants, and it is, therefore, your duty to render a verdict for the defendants."

(After this request there was a note to the effect that "if the above or a like request is given, all others are, of course, withdrawn.")

6. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against E. S. Nash and it is your duty to find in his favor."
7. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against S. P. Shotter and *is* is your duty to find in his favor."
- 46 8. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence against J. F. C. Myers and it is your duty to find in his favor."
9. Because the said Court erred in refusing to give the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against George M. Boardman and it is your duty to find in his favor."
10. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against Carl Moller and *is* is your duty to find in his favor."
11. Because the said Court erred in refusing to give the jury the following written instruction requested by these Defendants before the charge began, to-wit: "In the opinion of the Court, the penal provisions of the Statute invoked in this case are, in their meaning, uncertain and doubtful and, therefore, they ought not to be enforced. It has been held by the Courts that, 'where there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of the Court not to inflict the penalty.'"
12. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "Neither of the two counts before you charges that the defendants did anything, but they are charged with conspiracy to restrain trade and to monopolize trade and by certain means mentioned in the indictment. It is the contention of the government that it is not necessary to prove that all the means mentioned were a part of the conspiracy. It is the contention of the Defendants that it must be proven that all of these means were a part of the conspiracy. Where a court is in doubt as to the construction to be given to an indictment, that doubt must be resolved in favor of the Defendants. Therefore it is that the Court charges you (it being admitted that all the means mentioned in the indictment were a part of the agreement, that is to say, no evidence has been shown that they were a part) that the case has not been made out, and it is your duty to acquit the Defendants."
13. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "It is alleged in both

counts that the alleged conspiracy was formed by the Defendants in the Eastern Division of the Southern District of Georgia, and it is the duty of the Government to prove that the conspiracy agreement was entered into in this Division. No evidence being submitted to show that the conspiracy was entered into in this Division, and the evidence being entirely consistent with the fact that, if made, it was entered into elsewhere, it becomes the duty of the Court to charge you that the venue has not been shown and you must, therefore, acquit the Defendants."

14. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose in itself criminal or unlawful, by criminal or unlawful means.' One of the essential prerequisites, therefore, for the government to prove in this case is that two or more of these Defendants combined and agreed together, by concerted action, to restrain trade within the meaning of the law or to monopolize trade within the meaning of the law. These words imply a meeting together, deliberation and purpose. The fact that two or more of them made an effort to restrain trade or to monopolize trade would not establish the charge made. In addition to this, you would have to be satisfied by the evidence, beyond a reasonable doubt, that they combined together, that is to say, mutually agreed together to do this and to do it by concerted action. In addition, you must find, by proof submitted, that such a conspiracy agreement was made in the State of Georgia, the Southern District of Georgia and the Eastern Division of the Southern District."

15. Because the said Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The doing of anything a number of times, or repeatedly, whether you regard it as objectionable or not, would not be material in this prosecution, unless the evidence convinced you, beyond a reasonable doubt, that these things were done as a part and parcel of unlawful conspiracy, and this conspiracy was fully proven. For example it is charged in the indictment that the making of tentative offers was a part of the

48 conspiracy. If there has been no evidence produced to show that any tentative offers were made, except to one customer, you would not be authorized to regard all evidence of this character whether you thought it proper or improper."

16. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendant before the charge began without any qualification, to-wit: It is charged in the indictment and specifications that bonuses were offered to cause postponement of deliveries, but the bill of particulars confines this to the case of Lilly Varnish Company. You have heard the evidence of Mr. Lilly, the only witness produced on this line. Even if you find that his evidence makes out this charge, and you should attach any importance to the charge, you would not be authorized to find a conspiracy because of an isolated case like this." The Court

gave this instruction but added as follows: "With this qualification which I give you: Unless this fact, if it be a fact, and coupled with all the other evidence in the case, satisfies your minds beyond a reasonable doubt that two or more of the defendants conspired to restrain interstate commerce or with foreign nations."

17. Because the Court erred in adding the qualification just mentioned in the preceeding assignment of error.

18. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "What might be called the first specification, as amplified by the Bill of Particulars, is that a part of the conspiracy was the controlling, manipulating and arbitrarily bidding down and depressing the market price of naval stores, so that competitors and producers could not sell except at ruinous prices, and that this was done in Savannah, Jacksonville, New York, London, Liverpool and Hamburg, and it is further stated that the competitors affected by the price thus reduced were the J. R. Saunders Company, John A. Casey Company, James Corner & Sons and the Paterson Export Company. The Court charges you that no evidence has been introduced as to any of these alleged competitors except the Paterson Export Company, and even if it were proven that the charge was true as to the Paterson Export Company, this isolated instance would not justify a conviction of a conspiracy."

19. Because the Court erred in refusing to give the jury the following written instruction submitted by the defendants before the charge began, to-wit: "The second specification with reference to the alleged conspiracy, as amplified by the Bill of Particulars, is, that the government expects to prove that the diversion of naval stores receipts referred to in the second paragraph of the Court's order was forced and coerced from the Ports of Fernandina and Jacksonville, Florida, and Brunswick, Georgia, to the Port of Savannah, Georgia, and that this was done by the Defendants themselves and by divers agents of the American Naval Stores Company and National Transportation and Terminal Company at this time to the Assistant United States Attorneys unknown. Further that the naval stores thus diverted included both spirits of turpentine and rosin." The Government is held to this charge and it will be noticed that the alleged diversion is from the two Florida Ports mentioned to the Port of Savannah. You cannot convict on account of this unless you find that what was done was improper, and that it was done often enough to show a conspiracy, and that such a conspiracy was illegal and wrongful."

20. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The third specification reads as follows: By purchasing thereafter, at divers times, a large part of its supplies at naval stores ports known as closed ports, and wilfully and with the deliberate intent and purpose of depressing the market restraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Sa-

vannah market being the basic or primary market in the United States for naval stores, and the said Defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on a basis of the market at Savannah.

"There is no evidence before the jury as to the amounts of purchases from closed ports. Mr. Brown, a witness for the Government, testified as to purchases at the Jacksonville market—Jacksonville not being a closed port—and these purchases included those at Fernandina and Tampa, but there was no separation, and, for this reason, the proof has failed as to this, even should you find that what was done was improper and unlawful and a part of a conspiracy, such as the Court has charged you."

21. Because the Court erred in refusing to give the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The fourth specification
50 charges that the Defendants coerced factors and brokers into entering into contracts with the Defendants for the storage and purchase of their receipts and refusing to purchase unless such contracts were entered into."

"The only evidence offered on this line is as to the West, Flynn & Harris Company contract and one with the Consolidated Naval Stores Company. If you find that the American Naval Stores Company saw fit not to buy from either of these parties, and these parties saw fit to enter into contracts with them, whether they liked the contracts altogether or not, this would not be coercion in any legal sense and you could not regard such evidence. The contract of the Consolidated Naval Stores Company was not even made with this Defendant."

22. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "Under the seventh specification and the Court's order it is stated that the Government expects to prove that the practice of falsely and fraudulently raising the grades of rosin without reinspections was carried on at Brooklyn, New York, Hamburg, Germany, Tampa, Florida, Jacksonville, Florida, Ludlow, Kentucky, East St. Louis, Illinois, and divers other places at this time to the Assistant United States Attorneys unknown. There has been no effort to show anything of the kind except as to a yard in Brooklyn, New York. The Court charges you to disregard evidence as to the Brooklyn yard. Acts alleged to have been done outside of the jurisdiction, of this Court, and the Brooklyn yard would be outside of the jurisdiction, cannot be used as evidence of a conspiracy. In addition to this, the allegation in this seventh paragraph is that the alleged raising of grades without reinspection was done 'under the direction of the respective managers of said Companies' terminals at the points named.' The undisputed evidence shows that these managers were not connected in any way with the defendant Companies now on trial, that is to say, the American Naval Stores Company of West Virginia, whose principal office is located in Savannah, and the National Transportation and Terminal Company of New Jersey. The evidence shows that the naval stores referred

to by the Government's witnesses had become the property of the New York American Naval Stores Company, were on the yards of the New York National Transportation & Terminal Company, and the employes involved were employes of this latter Company and were not the employes of either of the Defendant Companies on trial."

23. Because the Court erred, in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "An effort has been made by the Government to substantiate the charge of false gauging, alleged to have taken place on the yards of the National Transportation & Terminal Company at Jacksonville, Florida. Gauging means the measuring of a barrel for the purpose of ascertaining its contents. The taking out of spirits from a barrel after it has been gauged, whether this was properly or improperly done, would not sustain such a charge. When the Government makes a charge it must prove it strictly as made."

24. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The ninth specification charges the postponement of deliveries, and that the Lilly Varnish Company, of Indianapolis, and two German Houses, mentioned in the ninth specification, were offered bonuses in order to postpone deliveries, and Bartels and another German party were threatened with a boycott. The Court charges you that there is no evidence before you to sustain this ninth specification as to these parties, and, therefore, you should disregard it, even although you should think there was anything unlawful or improper about it."

25. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The eleventh specification charges the Defendants with selling naval stores at prices far below the actual cost to themselves so as — compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors, and the twelfth that the Defendants willfully and arbitrarily fixed the price of spirits of turpentine in the United States below the cost of production. In the Bill of Particulars it is alleged that in the months of November and December, 1907, the American Naval Stores Company at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by the manager of the New York City office of the American Naval Stores Company, and at Philadelphia, Pa., by the Manager of the Philadelphia Branch Office of the American Naval Stores Company, and divers other sales made at divers other places and on divers other times to consumers and by re-sentatives of the American Naval Stores Company at this time to the Assistant United States Attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market according to this Bill of Particulars at those times expressed below the cost of production by the Defendants and in the manner specified in the first and second counts of the indictment."

26. Because the Court erred in refusing to give, without qualification, the following written instruction submitted by the Defendants before the charge began, to-wit: "A business corporation, like the American Naval Stores Company, has a perfect right to buy when and where it pleases and to refrain from buying when and where it pleases. It has a perfect right to refuse to enter into contracts, if it does not wish to do so. It has a perfect right to select its own customers and to refrain from dealing with people that it does not, for any business reason, care to deal with. Its failure to buy from a competitor may cause the competitor to fail but the law does not attempt to prevent anything of the kind. The Constitution of the State guarantees to traders the liberty of contract." The Court added after giving this request, the following: "This is true, provided—this is the qualification which the Judge gives you: This is true provided that such corporations do not violate the interstate law or statute as I have explained to you in my general charge."

27. Because the Court erred in adding the qualifications just mentioned in the proceeding assignment of error.

28. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "If one trader, be it a corporation or a natural person, by reason of larger wealth and resources, or other lawful advantages, can undersell a rival and put the rival out of business, or declines to deal with a rival, and thus put him out of business, there is no law against this. Such a power is an incident often of large means or greater business ability and skill, and the law does not attempt to interfere with such advantages." The Court added, after giving this instruction, these words: "unless the methods and practices adopted for the control of interstate trade and commerce would result in restraint of such trade and commerce, which I have previously explained to you in my general charge."

53 29. Because the Court erred in adding the qualification just mentioned.

30. Because the Court erred in instructing the jury as follows: "Since the size of the business alone is not necessarily illegal, it is the crushing of competition by means of force, threats, intimidations, fraud or artful and deceitful means and practices which violate the law. You will consider carefully all the means which the indictment charges, and inquire, first, whether the Defendants or any two or more of them did, in fact, unlawfully combine, conspire, confederate and agree together to monopolize by acquiring such power over the disposition of rosins, turpentine and naval stores which were the subject of interstate and foreign commerce, so that they were capable of forming and did form a scheme to crush and stifle competition, and, second, if such scheme of gaining and controlling business was to be effected by the illegal methods of force, threats, intimidations, fraud, or artful and deceitful means and practices, which their competitors in such trade were necessarily unable to meet." Defendants contending that there was no evidence to sustain this charge, and that it is otherwise illegal.

The Court withdrew from the consideration of the jury only three

of the twelve specifications—the three withdrawn being those as to false statements, the issuance and circulation and hypothecation of fraudulent warehouse receipts and the alleged bribery of employes of competitors. The Court submitted all the other specifications.

31. Because the Court erred in submitting to the jury all of the specifications mentioned in the indictment save only the three withdrawn, those three being those stated in the preceding assignment of error; Defendants contending that there was no allegation in the indictment or evidence to justify such submission to the jury, and that the doing of it was otherwise illegal.

32. Because the Court erred in instructing the jury as follows: "Conspiracies may be entered into in a very informal way, generally in fact in an informal way. The parties may not come together at all. They may be in different parts of the country, but if, by any means, by telegraph or letter, or by any means whatsoever, they may come to a mutual understanding for committing any offense against the Government, that would be a conspiracy." Defendants contending that this charge was unauthorized by the evidence and is otherwise illegal.

54 33. Because the Court erred in instructing the jury as follows: "The first count charges that the Defendants, the American Naval Stores Company, National Transportation & Terminal Company, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller unlawfully, knowingly and amongst themselves combined, conspired, confederated and agreed together to restrain trade and commerce among the several States and with foreign nations. The first count sets forth twelve different means by which the alleged conspiracy in restraint of trade was to be carried into effect. As to three of these means though there has been no testimony. Evidence of certain alleged means has been submitted to your consideration for two purposes: First, as circumstantial evidence that the defendants formed a conspiracy, and second, that such means naturally and necesasrily tender — or did cause restraint of interstate and foreign trade and commerce. It is the contention of the government that they were parts and elements of a scheme and design on the part of the defendants to restrain trade; and you may consider all of the means on which evidence has been submitted as circumstances merely from which you may or may not conclude that there was such an understanding, that is, co-operation and design upon the part of two or more defendants as would under all the rules I have given to you be sufficient to constitute a conspiracy between them, and this, as I have said, must be shown beyond a reasonable doubt. With this issue in view, you may consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy." Defendants contend that the charge just quoted was unauthorized by the evidence and otherwise illegal.

The Court added to this portion of the charge the following: "No evidence as to three of [the] means has been offered, and you should not consider them. Those are the charges of circulating and publishing false statements, charging the issuing and causing to be cir-

culated and hypothecated fraudulent warehouse receipts, and the charge of attempting to bribe employes of competitors and factors to obtain certain information. Those are the means and matters alleged in the indictment on which there has been no testimony."

34. Because the Court erred in instructing the jury as follows: "One of the means charged is the coercion of factors and brokers into entering into certain contracts which you will recall. It will be well for you to understand the legal meaning of coercion. The

55 word coerce means to restrain, by force, especially by law or authority, to repress; in the sense which now prevails it differs but little from the word compel, yet there is a distinction between them, coercion being usually accomplished by indirect means, as threats, intimidation, physical force being more rarely used in coercion. It imports, however, some actual or direct exercise of power possessed, or supposed to be possessed by the party who it is claimed so acted." The objection to this being that there was no evidence at all before the jury to show coercion, and the charge is otherwise illegal.

35. Because the Court erred in charging the jury as follows: "It is not necessary for the Government to prove that all the means charged were in fact a part of a single purpose and conspiracy by two or more of the defendants, or that all of the means charged were in fact carried out by two or more of the defendants. It is sufficient if it be shown beyond a reasonable doubt that some of those means charged were a part of the common scheme, design, or understanding or conspiracy by two or more of the defendants, and that these same means were of themselves sufficient to cause an essential obstruction and restraint of the free and untrampled flow of trade and commerce between the States and foreign nations." Defendants contending that this charge was unauthorized by the evidence and is otherwise illegal.

36. Because the Court erred in instructing the jury as follows: "If you should find under these principles laid down that any of the alleged means were employed, and that the necessary effect of those means was to restrain interstate and foreign commerce, in considering whether these means or acts were a part or purpose of the several defendants toward those means and acts and towards each other. If you should find beyond a reasonable doubt that certain acts were done or means employed, you may enquire who were responsible for those acts, whether any two or more of the defendants were responsible, and whether such acts were the result of a pre-conceived plan for concert and action on the part of any two or more of the defendants." Defendants contend that this charge was unauthorized by the evidence and is otherwise illegal.

37. Because the Court erred in charging the jury as follows. "A corporation, although an artificial being existing only in contemplation of law, is held to the same measure of liability as an individual and is entitled to the same rights of protection as an individual.

56 A corporation acts through its officers, its directors and its agents. While one corporation cannot conspire with its own officers, directors or agents, it may conspire with another

corporation, or with the officers, directors and agents of another corporation. Corporations may conspire with individuals, as well as individuals may conspire with one another, they may conspire with another corporation; but you must always bear in mind that a corporation is only responsible for the acts of its agents while acting within the scope of their employment, or for such acts only as may have been authorized." The objection to this charge being that it is without evidence to sustain it and is otherwise illegal. The Defendants contended throughout the trial that the only trader mentioned in the indictment was the American Naval Stores Company, that all of the individual Defendants were alleged to be representatives of this Company, three of them being also alleged to be representatives of the other corporation, and that there could not be a conspiracy to restrain trade or to monopolize trade by corporations through officers, and at the same time, with officers, and the Court should not have submitted to the jury any theory which would have permitted them to have found any of the individuals guilty or either of the corporate defendants.

38. Because the Court erred in charging the jury as follows: "The indictment charges that the defendants conspired with divers other persons to the grand jurors unknown. If you find that any two or more of the defendants conspired with any person not named in the indictment to commit the offense charged, you would be authorized under the rules laid down to find any two or more of the defendants guilty under either or both counts." The objection to this charge being that it was without evidence to sustain it, and is otherwise illegal.

39. Because the Court erred in instructing the jury as follows: "Evidence has been introduced to the effect that two other corporations which are distinct from the defendant companies existed in the State of New York at the time of the alleged acts. The defendant companies are the American Naval Stores Company of West Virginia and the National Transportation & Terminal Company, alleged to be organized under the laws of New Jersey. The New York Corporations were known as the American Naval Stores Company, of New York, and the National Transportation & Terminal Company of New York. Evidence has been introduced as to certain transactions or acts occurring on the yards in Brooklyn, New York, of this Transportation & Terminal Company of New York. The

57 witness O'Keefe testified that he was employed by the American Naval Stores Company, and other witnesses testified that they worked at the yards in question. The witness Dill testified that he was the President of the National Transportation & Terminal Company of New York and the Manager of the American Naval Stores Company of New York, and that he employed O'Keefe for the National Transportation & Terminal Company of New York, and that the yards belonging to the National Transportation & Terminal Company of New York. You have heard the evidence as to the ownership of the rosin which entered this yard. If you find that the acts alleged by certain employés were done by employés of the New York corporation, and that these corpora-

tions were separate and distinct from the two defendant corporations, and that such New York corporations did not conspire with either of these corporations as charged, with two or more of the defendants, then you should not consider any of the acts which are charged to have occurred on the properties of these New York corporations, or the acts of employes or agents thereof. But if on the other hand the evidence satisfies you beyond a reasonable doubt that one or both of the New York corporations was in fact so owned, controlled, dominated and operated by one or both of the defendant corporations, that it had the same officers, and it was in fact its business transactions for all practical purposes identical with one or both of the defendant corporations, the New York corporation which you find so connected you may consider in connection with the defendant. If you then further find that two or more of the defendants conspired as charged with one or both of the New York corporations to monopolize and restrain interstate trade and commerce, you would be authorized to find a conviction as to such defendants; or if you find that the employes or agents of such New York corporation were in fact, as I have stated, employes or agents of one or both of the defendant corporations named in this indictment, and such corporations, if you find them so identical, would be responsible for the acts of such employe or employes if they au-horized them, or if they clearly ratified them, such wrongfully acts subsequently knowing them to have been committed. But you must consider this evidence in connection with all the other evidence in the case, that is whether there was any conspiring between any two of the defendants with either or both of the New York corporations or their agents, or whether said New York corporations or their agents and employes, were dominated directed and controlled by any two of the defendants, and that such acts or means alleged to have been committed at the Brooklyn yards were ratified by any two or more of the defendants."

58 The objection to this charge being that it was unauthorized by the evidence and is otherwise illegal.

40. Because the Court erred, at the conclusion of its charge in instructing the jury as follows: "The conspiracy, the venue of this offence will be where the conspiracy was formed; but a conspiracy may be formed by individuals residing in different States, or it may be carried from one district to another, if the objects and purposes of that conspiracy has a means for transporting or been committed in another district than that which it was formed."

The objection to this charge being that it was unsupported by the evidence and is otherwise illegal.

41. Because the Court erred, against the objections of Defendants, that there was no supporting allegation in the indictment, that the means charged were a part of the conspiracy agreement and had to be proven, and the Government was confined to a proof of the agreement, in permitting evidence from various witnesses attempting to show the doing of the acts mentioned in nine of the twelve specifications contained in the said two counts.

42. Because the Court erred in permitting the witness, John T.

West, against the objections of Defendants, to testify concerning the contract between the West, Flynn & Harris Company and the American Naval Stores Company, bearing date June 1st, 1907, for the purpose of showing that his Company was coerced into making such contract, the objection being that there was no evidence of coercion about the making of the contract, and that such evidence was entirely irrelevant.

43. Because the Court erred in admitting the said contract against the same objections made by Defendants.

44. Because the Court erred, against the objections of Defendants, in admitting the testimony of Walter F. Coachman to show coercion touching his contract with the S. P. Shotter Company, and the taking over of said contract by the American Naval Stores Company, the objection being that such evidence did not tend to maintain the allegation in the Indictment and Bill of Particulars touching any alleged coercion.

45. Because the Court erred, against the same objections of Defendants, in admitting the said contract in evidence.

59 46. Because the Court erred, against the objections of Defendants, to the effect that such evidence was irrelevant and illegal and did not intend to prove the allegation in the Bill of Indictment and Bill of Particulars, the testimony of William H. Hoskins, a witness of the Government, to the effect, that, after inspection of turpentine, some of it would be taken out of the barrel. The witness testifying to the following effect: "I do not know that Mr. Moller ever paid any particular attention, but he has been there during the time that this regulating was going on, and my orders from Mr. Woods, who was acting as custodian of the yard, was to always use my discretion, and when the weather was cool, to take about a gallon and if the weather was warmer, to take out less, however, we always after the inspectors turned it over to the American Naval Stores Company, why, we always taken out from half to a gallon, and we would fill other barrels and put them in the American Naval Company stock."

The objection to this evidence being that there was no supporting allegation in the indictment, that it did not tend to prove the charge made of false gauging, or that the Defendants were connected with it, and it was otherwise illegal.

47. Because the Court erred, against the objections of Defendants in admitting evidence from the witness E. O'Keefe, offered by the Government, to the effect, that the grades of a large quantity of rosin in the Brooklyn yards were raised without previous re-inspection, the objections to such evidence being that it was not warranted by the indictment and bill of particulars, and no Defendant on trial was connected therewith.

48. Because the Court erred, against the objections made by Defendants, in submitting similar testimony from the witness De Groot, offered by the Government.

49. Because the Court erred, against the same objections of Defendants, in admitting the testimony of the witness Clehan designed to show the same facts.

50. Because the Court erred in charging the jury as follows: "All the means and all the illegal acts which the indictment charges must have been done within three years prior to the finding of this indictment. Any acts beyond this period you would not consider."

The said charge being illegal in that it permitted the jury to consider the acts alleged to have been done prior to the incorporation of the American Naval Stores Company, the only trader mentioned in the indictment, and prior to February 11th, 1907, when it appeared that the Defendant, S. P. Shotter, was indicted under the same Act and plead guilty thereunder, and prior to the limitations fixed by the Bill of Particulars.

51. Because the Court erred in overruling the motion in arrest of judgment filed by the Defendants on the 12th day of May, 1909, and based upon the three grounds mentioned in the said Motion in Arrest of Judgment.

52. Because the verdict against these Defendants is without any evidence to sustain it as to these Defendants or as to any one of them, and it is unlawful and illegal.

53. Because the said verdict is illegal in that it appears that these Defendants are indicted as officers and representatives of the American Naval Stores Company, two of them being also representatives of the National Transportation and Terminal Company, and are charged with conspiracy to restrain trade and conspiracy to monopolize trade for and in behalf of the only trader mentioned in the indictment and the only party alleged to be connected with trade of any kind, namely, the American Naval Stores Company, and these Defendants cannot be found guilty with the corporations eliminated from the case and ignored by the verdict, particularly the American Naval Stores Company.

ADAMS & ADAMS,
GARRARD & MELDRIN,
Attorneys for Defendants.

[Indorsed:] Filed March 14th, 1909. T. F. Johnson, Clerk.

61 *Application for Writ of Error.*

In the United States Circuit Court for the Southern District of Georgia, Eastern Division.

UNITED STATES
vs.
AMERICAN NAVAL STORES COMPANY et al.

Conspiracy to Restrain Trade, etc.

Indictment Found April 11th, 1908.

And now come the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, in the above entitled cause, feeling themselves aggrieved by the

verdict of the jury rendered in the said cause on the 10th day of May, 1909, and the judgment entered thereon on the 14th day of May, 1909, by their attorneys at law, and petition the said Court for an order allowing said defendants to prosecute a writ of error to the Honorable the Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided, and for the correction of errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals; and they further pray that an order be made fixing the amount of security which these defendants shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Fifth Circuit. And your petitioners will ever pray.

This May 14, 1909.

(Sg.)

GARRARD & MELDRIM,
GARRARD & MELDRIM,
Att'ys for Defendants.

[Indorsed:] Filed May 14, 1909. T. F. Johnson, Clerk.

62

Order Allowing Writ of Error.

In the United States Circuit Court for the Southern District of Georgia, Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Conspiracy to Restrain Trade, etc.

Indictment Found April 11th, 1908.

On this the 14 day of May, 1909, came the defendants, Edmund S. Nash, Spencer P. Shotton, J. F. Cooper Myers, George M. Boardman and Carl Moller, by their attorneys at law, and file herein and present to the Court their petition praying for the allowance of a writ of error, an assignment of errors having been filed by them; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration thereof, the Court does allow the writ of error, upon the defendants giving joint bond according to law in the sum of \$20,000 dollars, to appear and receive the final judgment of the Court in terms of the law, which shall operate as a supersedeas bond.

In open Court, this 14th day of May, 1904.

(Sg.)

WM. B. SHEPPARD, *Judge.*

[Indorsed:] Filed May 14th, 1909. (Sg.) T. F. Johnson, Clerk.

* * * * *

Consent Order as to Bill of Exceptions.

In the United States Circuit Court for the Southern District of
Georgia, Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Conspiracy to Restrain Trade, etc.

Indictment Found April 11th, 1908.

This day came the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, and made application for an order extending the time for the signing, allowance and filing of the bill of exceptions herein and the preparation and embodiment of the evidence, and it is thereupon considered that the time for the signing, allowance and filing of the bill of exceptions of the said defendants is extended for forty-five days from this date.

It is further ordered that the said bill of exceptions may contain a condensed report, in narrative form, of the oral evidence submitted, and such parts of the documentary evidence as may be agreed on by counsel, said report of the evidence to be submitted to the Assistant United States District Attorney before the same has been approved by the Court.

In open Court, this 14th day of May, 1909.

(Sg.)

WM. B. SHEPPARD, *Judge.*

I agree to above order.

This May 14, 1909.

(Sg.)

ALEXANDER AKERMAN,

Ass't U. S. Att'y.

Bill of Exceptions.

In the Circuit Court of the United States for the Southern
District of Georgia and Eastern Division.

UNITED STATES

vs.

AMERICAN NAVAL STORES COMPANY et al.

Conspiracy to Restrain Trade, etc.

Be it remembered, that on the 12th day of April, 1909, during the April term of the United States Circuit Court in and for the

Southern District of Georgia and Eastern Division, the Honorable William B. Sheppard, Judge presiding, there came on to be heard the case of the United States vs. the American Naval Stores Company, National Transportation and Terminal Company, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, C. J. De Loach and Carl Moller, under an indictment found in the said Court on the 11th day of April, 1908, containing three counts, and purporting to be based upon an Act of Congress approved July 2, 1890, entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies." That, on the said day, the Assistant United States District Attorney arose for the purpose of calling upon the defendants to answer the said indictment, and thereupon he was informed by one of the attorneys for the defendants that he need not read the indictment, that defendants had a demurrer, and the said defendants thereupon file a demurrer to the said indictment, containing twenty-one grounds, as will more fully appear by reference to the said meurrer. That argument was had upon the demurrer, and, subsequently, to-wit: on the 19th day of April, 1909, the presiding Judge granted an order striking the third count in the said indictment, but overruling the demurrer as to the said first two counts, to which ruling of the Court overruling the demurrer as to the first and second counts the defendants then and there excepted and now except, upon grounds 1, 2, 3, 4, 5, 6, 7, 20 and 21 of the said demurrer, and say that the Court erred in overruling the said demurrer as to the said first and second counts and ought to have sustained the same. That a jury was subsequently duly impanelled to try the said cause.

That, on the 20th day of April, 1909, defendants filed their written motion for a bill of particulars; on the 22nd day of April, 1909, the presiding Judge passed an order directing that the attorneys for the Government furnish the bill of particulars as directed in said order. On the 24th day of April, 1909, the attorneys for the Government, in response to the order, filed a bill of particulars. Defendants, being still dissatisfied with the bill of particulars, asked for a further specification, and, on the 24th day of April, the second order was passed, requiring a further bill of particulars, which said second order was complied with by the second bill of particulars filed on the said 24th day of April, 1909.

Be it further remembered, that, at the conclusion of the testimony for the Government, the defendants jointly and severally moved the Court to direct a verdict for the defendants, upon the grounds that the evidence did not justify a conviction as to the defendants, or as to any one of them; that both counts were confined to the conspiracy agreement mentioned and required proof that all of the specifications mentioned were a part of the agreement; that, as to some of them, particularly those touching the alleged circulation and publication of false statements as to naval stores production and stock in hands of producers and their immediate representatives, the alleged issuance and causing to be circulated and hypothecated fraudulent warehouse receipts, the alleged

attempts to bribe employees of competitors and factors so as to obtain information as to competitors' business and stocks, no evidence of any kind had been offered, and, therefore, the proof failed as to these things being a part of the agreement; because the evidence showed that there was only one trader, and there was an entire absence of evidence as to any combination, alliance, agreement or understanding of any kind between this trader and any other trader, and, therefore, no evidence of any violation of the act invoked by the Government; because there could be no conspiracy between the trader mentioned in the indictment, the American Naval Stores Company, through its officers, and, at the same time, with its officers, and because nothing had been shown that involved in any way a violation of the Act of Congress. The Court overruled this motion, pronouncing an opinion which was not filed until after the trial. To the judgment of the Court overruling the motion to direct the defendants then and there excepted and now except, and say that the motion ought to have been sustained, and for the reasons indicated.

Be it further remembered, that, after the overruling of the motion to direct a verdict, the defendants introduced evidence and the Government subsequently introduced evidence in rebuttal, and that,

66 at the conclusion of the entire evidence, the defendants jointly and severally made another motion to direct a verdict upon the grounds hereinbefore stated, with reference to the motion to direct at the conclusion of the Government's testimony, but that the Court overruled this second motion to direct a verdict, and the defendants then and there excepted, and now except, upon each and all of the said grounds, and say that the Court ought to have sustained this motion to direct a verdict upon the said grounds.

The Court charged the jury and a verdict was rendered by the jury on the 10th day of May, 1909.

At the conclusion of the evidence for the Government, when the Government rested, and before the beginning of the introduction of evidence for the defense, the Government announced, through its attorneys, that it would not ask for a verdict against the defendant, C. J. De Loach.

Be it further remembered, that, before the beginning of the charge to the jury, the defendants requested the Court to instruct the jury as follows: "The Government has failed to make out, by legal evidence, a case against any of the defendants, and it is, therefore, your duty to render a verdict for the defendants." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

At the conclusion of this request defendants added the following note: "If the above, or a like request, is given, all others are, of course, withdrawn."

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "No case has been made out, by legal evidence, against E. S. Nash, and it is your duty to find in his favor." The Court

refused to give this request, and the defendants and the said Nash then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury the defendants requested the Court to give the following written instruction to the jury, to-wit: "No case has been made out, by legal evidence, against S. P. Shotter, and it is your duty to find in his favor." The Court refused to give this request, and the defendants and the said Shotter then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "No case has been made out, by legal evidence, against J. F. C. Myers, and it is your duty to find in his favor." The Court refused to give this request, and the defendants and the said Myers then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury the defendants requested the Court to give the following written instruction to the jury, to-wit: "No case has been made out, by legal evidence, against George M. Boardman, and it is your duty to find in his favor." The Court refused to give this request, and the defendants and the said Boardman then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "No case has been made out, by legal evidence, against Carl Moller, and it is your duty to find in his favor." The Court refused to give this request, and the defendants and the said Moller then and there, before the jury retired, except to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "In the opinion of the Court, the penal provisions of the statute invoked in this case are, in their meaning, uncertain and doubtful, and, therefore, they ought not to be enforced. It has been held by the Courts that, 'where there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a Court not to inflict the penalty.'" The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "Neither of the two counts before you charges that the defendants did anything, but they are charged with conspiracy

to restrain trade, and to monopolize trade by certain means mentioned in the indictment. It is the contention of the Government that it is not necessary to prove that all the means mentioned were a part of the conspiracy. It is the contention of the defendants that it must be proven that all of these means were a part of the conspiracy. Where a Court is in doubt as to the construction to be

68 given to an indictment, that doubt must be resolved in favor of the defendants. Therefore it is that the Court charges you

(it being admitted that all the means mentioned in the indictment were not a part of the agreement, that is to say, no evidence has been shown that they were a part) that the case has not been made out, and it is your duty to acquit the defendants." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury the defendants requested the Court to give the following written instruction to the jury, to-wit: "It is alleged in both counts that the alleged conspiracy was formed by the defendants in the Eastern Division of the Southern District of Georgia, and it is the duty of the Government to prove that the conspiracy agreement was entered into in this Division. No evidence being submitted to show that the conspiracy was entered into in this Division, and the evidence being entirely consistent with the fact that, if made, it was entered into elsewhere, it becomes the duty of the Court to charge you that the venue has not been shown, and you must, therefore, acquit the defendants." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose in itself criminal or unlaw[ful], by criminal or unlawful means.' One of the essential prerequisites, therefore, for the Government to prove in this case is that two or more of these defendants combined and agreed together, by concerted action, to restrain trade within the meaning of the law or to monopolize trade within the meaning of the law. These words imply a meeting together, deliberation and purpose. The fact that two or more of them made an effort to restrain trade or to monopolize trade would not establish the charge made. In addition to this, you would have to be satisfied by the evidence, beyond a reasonable doubt, that they combined together, that is to say, mutually agreed together to do this and to do it by concerted action. In addition, you must find, by proof submitted, that such a conspiracy agreement was made in the State of Georgia, the Southern District of Georgia, and the Eastern Division of this Southern District."

69 The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this re-

fusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "The doing of anything a number of times, or repeatedly, whether you regard it as objectionable or not, would not be material in this prosecution, unless the evidence convinced you, beyond a reasonable doubt, that these things were done as a part and parcel of an unlawful conspiracy, and this conspiracy was fully proven. For example, it is charged in the indictment that the making of tentative offers was a part of the conspiracy. If there has been no evidence produced to show that any tentative offers were made, except to one customer, you would not be authorized to regard at all evidence of this character, whether you thought it proper or improper." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instructions to the jury, to-wit: "It is charged in the indictment and specifications that bonuses were offered to cause postponement of deliveries, but the bill of particulars confines this to the case of the Lilly Varnish Company. You have heard the evidence of Mr. Lilly, the only witness produced on this line. Even if you find that this evidence makes out this charge, and you should attach any importance to the charge, you would not be authorized to find a conspiracy because of an isolated case like this." The Court gave this instruction, but with the following qualification: "With this qualification which I give you: Unless this fact, if it be a fact, and coupled with all the other evidence in the case, satisfies your minds beyond a reasonable doubt that two or more of the defendants conspired to restrain interstate commerce or with foreign nations."

The defendants then and there excepted to the adding of the qualification and making it a part of the request.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "What might be called the first specification, as amplified by the bill of particulars, is that a part of the conspiracy was the
70 controlling, manipulating and arbitrarily bidding down and depressing the market price of naval stores, so that competitors and producers could not sell except at ruinous prices, and this was done in Savannah, Jacksonville, New York, London, Liverpool and Hamburg; and it is further stated that the competitors affected by the price thus reduced were the J. R. Saunders Company, John A. Casey Company, James Corner & Sons and the Paterson Export Company. The Court charges you that no evidence has been introduced as to any of these alleged competitors except the Paterson Export Company, and even if it were proven that the charge was true as to the Paterson Export Company, this isolated instance would not justify a conviction of conspiracy." The Court

refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury the defendants requested the Court to give the following written instruction to the jury, to-wit: "The second specification with reference to the alleged conspiracy, as amplified by the bill of particulars, is 'that the Government expects to prove that the diversion of naval stores receipts referred to in the second paragraph of the Court's order was forced and coerced from the Ports of Fernandina and Jacksonville, Florida, and Brunswick, Georgia, to the port of Savannah, Georgia, and that this was done by the defendants themselves and by divers agents of the American Naval Stores Company and National Transportation and Terminal Company at this time to the Assistant United States Attorneys unknown. Further, that the naval stores thus diverted included both spirits of turpentine and rosin.' The Government is held to this charge, and it will be noticed that the alleged diversion is from the two Florida ports mentioned to the port of Savannah. You cannot convict on account of this unless you find that what was done was improper, and that it was done often enough to show a conspiracy, and that such a conspiracy was illegal and wrongful." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now excepts, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "The third specification reads as follows: 'By purchasing thereafter, at divers times, a large part of its supplies at naval stores ports known as closed ports, and wilfully and with the deliberation intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market, where its purchase, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basic or primary market in the United States for naval stores, and the said defendants taking the receipts of said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile, on a basis of the Savannah market.' There is no evidence before the jury as to the amounts of purchases from closed ports. Mr. Brown, a witness for the Government, testified as to purchases at the Jacksonville market—Jacksonville not being a closed port—and these purchases included those at Fernandina and Tampa, but there was no separation, and, for this reason, the proof has failed as to this, even should you find that what was done was improper and unlawful and a part of a conspiracy, such as the Court has charged you."

The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury the defendants requested the Court to give the following written instruction to the

jury, to-wit: "The fourth specification charges that the defendants 'coerced factors and brokers into entering into contracts with the defendants for the storage and purchase of their receipts and refusing to purchase unless such contracts were entered into.' The only evidence offered on this line is as to the West, Flynn & Harris Company contract and one with the Consolidated Naval Stores Company. If you find that the American Naval Stores Company saw fit not to buy from either of these parties, and these parties saw fit to enter into the contracts with them, whether they liked the contracts altogether or not, this would not be coercion in any legal sense, and you could not regard such evidence. The contract of the Consolidated Naval Stores Company was not even made with this defendant."

The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "Under the seventh specification and the Court's order, it is stated that the Government expects to prove that the practice

72 of falsely and fraudulently raising the grades of rosin without reinspections was carried on at Brooklyn, New York, Hamburg, Germany; Tampa, Florida; Jacksonville, Florida; Ludlow, Kentucky; East St. Louis, Illinois, and divers other places at this time to the Assistant United States Attorneys unknown. There has been no effort to show anything of the kind except as to a yard in Brooklyn, New York. The Court charges you to disregard the evidence as to the Brooklyn yard. Acts alleged to have been done outside of the jurisdiction of this Court, and the Brooklyn yard would be outside of the jurisdiction, cannot be used as evidence of a conspiracy. In addition to this, the allegation in this seventh paragraph is that the alleged raising of grades without reinspection was done 'under the direction of the respective managers of said companies' terminals at the points named.' The undisputed evidence shows that these managers were not connected in any way with the defendant companies now on trial, that is to say, the American Naval Stores Company of West Virginia, whose principal office is located in Savannah, and the National Transportation and Terminal Company of New Jersey. The evidence shows that the naval stores referred to by the Government's witnesses had become the property of the New York American Naval Stores Company, were on the yards of the New York National Transportation & Terminal Company, and the employes involved were employes of this latter company and were not the employes of either of the defendant companies on trial."

The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, defendants re-

requested the Court to give the following written instruction to the jury, to-wit: "An effort has been made by the Government to substantiate the charge of false gauging, alleged to have taken place on the yards of the National Transportation & Terminal Company at Jacksonville, Florida. Gauging means the measuring of a barrel for the purpose of ascertaining its contents. The taking out of spirits from a barrel after it has been gauged, whether this was properly or improperly done, would not sustain such a charge. When the Government makes a charge, it must prove it strictly as made." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "The ninth specification charges the postponement of deliveries, and that the Lilly Varnish Company, of Indianapolis, and two German houses, mentioned in the ninth specification, were offered bonuses in order to postpone deliveries, and Bartels and another German party were threatened with a boycott. The Court charges you that there is no evidence before you to sustain this ninth specification as to these parties, and, therefore, you should disregard it, even although you should think there was anything unlawful or improper about it." The Court refused to give this request, and the defendants then and there, before the jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "The eleventh specification charges the defendants with selling naval stores at prices far below actual cost to themselves so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors, and the twelfth that the defendants wilfully and arbitrarily fixed the price of spirits of turpentine in the United States below the cost of production. In the bill of particulars it is alleged that 'in the months of November and December, 1907, the American Naval Stores Company at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by the manager of the New York City office of the American Naval Stores Company; at Philadelphia, Pa., by the manager of the Philadelphia Branch Office of the American Naval Stores Company, and divers other sales made at divers other places and on divers other times to consumers and by representatives of the American Naval Stores Company at this time to the Assistant United States Attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market, according to this bill of particulars, at those times depressed below the cost of production by the defendants in the manner specified in the first and second counts of the indictment.'" The Court refused to give this request, and the defendants then and there, before the

jury retired, excepted to this refusal, and now except, and make such exception a part of this their bill of exceptions.

Before the beginning of the charge to the jury the defendants requested the Court to give the following written instruction to the jury, to-wit: "A business corporation, like the American Naval

74 Stores Company, has a perfect right to buy when and where it pleases, and to refrain from buying when and where it pleases. It has a perfect right to refuse to enter into contracts, if it does not wish to do so. It has a perfect right to select its own customers and to refrain from dealing with people that it does not, for any business reason, care to deal with. Its failure to buy from a competitor may cause the competitor to fail, but the law does not attempt to prevent anything of the kind. The Constitution of the State guarantees to traders the liberty of contract." The Court gave this instruction, but with the following qualification: "This is true, provided—this is the qualification which the Judge gives you: This is true provided that such corporations do not violate the interstate law or statute as I have explained to you in my general charge."

The defendants then and there excepted to the adding of the qualification and making it a part of the request.

Before the beginning of the charge to the jury, the defendants requested the Court to give the following written instruction to the jury, to-wit: "If one trader, be it a corporation or a natural person, by reason of larger wealth and resources, or other lawful advantages, can undersell a rival and put the rival out of business, or declines to deal with a rival, and thus put him out of business, there is no law against this. Such a power is an incident often of large means or greater business ability and skill, and the law does not attempt to interfere with such advantages." The Court gave this instruction, but with the following qualification: "unless the methods and practices adopted for the control of interstate trade and commerce would result in restraint of such trade and commerce, which I have previously explained to you in my general charge."

The defendants then and there excepted to the adding of the qualification and making it a part of the request.

Be it further remembered, that the Court instructed the jury as follows: "Since the size of the business alone is not necessarily illegal it is the crushing of competition by means of forced threats, intimidations, fraud or artful and deceitful means and practices which violate the law. You will consider carefully all the means which the indictment charges, and inquire, first, whether the defendants or any two or more of them did, in fact, unlawfully combine, conspire, confederate and agree together to monopolize, by acquiring such power over the dispositions of rosins, turpentine and naval stores which were the subject of interstate and foreign commerce so that they were capable of forming and did form a scheme to crush and stifle competition; and, second, if such scheme of gaining and controlling business was to be effected by the illegal methods of force, threats, intimidations, fraud or artful and

deceitful means and practices, which their competitors in such trade were necessarily unable to meet."

Defendants then and there, before the retirement of the jury, excepted to the giving of this charge, upon the grounds that there was no evidence to sustain the charge and that it did not embody a correct proposition of law in view of the undisputed facts, and make this exception a part of their bill of exceptions.

In point of fact, the Court withdrew from the consideration of the jury only three of the twelve specifications,—the three withdrawn being those as to false statements, the issuance and circulation and hypothecation of fraudulent warehouse receipts and the alleged bribery of the employees of competitors. The Court submitted all the other specifications.

Before the retirement of the jury the defendants excepted to the submitting to the jury by the Court of the specifications mentioned in the indictment, save only the three withdrawn, those three being those just stated, defendants contending that there was no allegation in the indictment or evidence to justify such submission to the jury, and that the doing of this was otherwise illegal, and defendants excepted to this submission by the Court and make the exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "Conspiracies may be entered into a very informal way, generally, in fact, in an informal way. The parties may not come together at all. They may be in different parts of the country; but if by any means, by telegraph or letter, or by any means whatsoever, they may come to a mutual understanding for committing any offense against the Government, that would be a conspiracy."

Defendants, before the retirement of the jury, then and there excepted to the giving of this instruction, and claim that the charge was unauthorized by the evidence, and was otherwise illegal, and make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "The first count charges that the defendants, the American Naval Stores Company, National Transportation & Terminal Company, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, C. J. De Loach and Carl Moller, unlawfully, knowingly and amongst themselves combined, conspired, confederated and agreed together to restrain trade and commerce among the several states and with foreign nations.

The first count sets forth twelve different means by which the alleged conspiracy in restraint of trade was to be carried into effect. As to three of these means, though, there has been no testimony. Evidence of certain alleged means has been submitted to your consideration for two purposes: First, as circumstantial evidence that the defendants formed a conspiracy; and, second, that such means naturally and necessarily tended or did cause restraint of interstate and foreign trade and commerce. It is the contention of the Government that they were parts and elements of a scheme and design on the part of the defendants to restrain trade; and you may consider all of the means on which evidence has been submitted

as circumstances merely from which you may or may not conclude that there was such an understanding, that is, co-operation and design upon the part of two or more defendants as would under all the rules I have given to you be sufficient to constitute a conspiracy between them, and this, as I have said, must be shown beyond a reasonable doubt. With this issue in view, you may now consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "One of the means charged is the coercion of factors and brokers into entering into certain contracts which you will recall. It will be well for you to understand the legal meaning of coercion. The word coerce means to restrain, by force, especially by law or authority, to repress; in the sense which now prevails it differs little from the word compel, yet there is a distinction between them, coercion being usually accomplished by indirect means, as threats, intimidation, physical force being more rarely used in coercion. It imports, however, some actual or direct exercise of power possessed, or supposed to be possessed, by the party who it is claimed so acted."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exception.

77 Be it further remembered, that the Court instructed the jury as follows: "It is not necessary for the Government to prove that all the means charged were in fact a part of a single purpose and conspiracy by two or more of the defendants, or that all of the means charged were in fact carried out by two or more of the defendants. It is sufficient if it be shown beyond a reasonable doubt that some of those means charged were a part of the common scheme, design or understanding or conspiracy by two or more of the defendants, and that these same means were of themselves sufficient to cause an essential obstruction and restraint of the free and untrammelled flow of trade and commerce between the States and foreign nations."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "If you should find under these principles laid down that any of the alleged means were employed, and that the necessary effect of those means was to restrain interstate and foreign commerce, in considering whether those means or acts were a part or purpose of the several defendants toward those means and acts and towards each other. If you should find beyond a reasonable doubt that certain acts were done or means employed, you may enquire who were

responsible for those acts, whether any two or more of the defendants were responsible, and whether such acts were the result of a pre-conceived plan for concert of action on the part of any two or more of the defendants."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "A corporation, although an artificial being, existing only in contemplation of law, is held to the same measure of liability as an individual, and is entitled to the same rights of protection as an individual. A corporation acts through its officers, its directors and its agents. While one corporation cannot conspire with its own officers, directors or agents, it may conspire with another corporation, or with the officers, directors and agents of another corporation. Corporations may conspire with individuals, as well as individuals may conspire with one another, they may conspire with another corporation; but you must bear always in mind that a corporation is only responsible for the acts of its agents while acting
78 within the scope of their employment, or for such acts only as may have been authorized."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "The indictment charges that the defendants conspired with divers other persons to the grand jurors unknown. If you find that any two or more of the defendants conspired with any person not named in the indictment to commit the offense charged, you would be authorized under the rules laid down to find any two or more of the defendants guilty under either or both counts."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "Evidence has been introduced to the effect that two other corporations which are distinct from the defendant companies, existed in the State of New York at the time of the alleged acts. The defendant companies are the American Naval Stores Company of West Virginia and the National Transportation & Terminal Company, alleged to be organized under the laws of New Jersey. The New York corporations were known as the American Naval Stores Company of New York and the National Transportation & Terminal Company of New York. Evidence has been introduced as to certain transactions or acts occurring on the yards in Brooklyn, N. Y., of pany, alleged to be organized under the laws of New Jersey. The New
ness, O'Keefe, testified that he was employed by the American Naval Stores Company, and other witnesses testified that they worked at

the yards in question. The witness, Dill, testified that he was the President of the National Transportation & Terminal Company of New York and the manager of the American Naval Stores Company of New York, and that he employed O'Keefe for the National Transportation & Terminal Company of New York, and that the yards belonged to the National Transportation & Terminal Company of New York. You have heard the evidence as to the ownership of the rosin which entered this yard. If you find that the acts alleged by certain employes were done by employees of the New York corporation, and that these corporations were separate and distinct from the

79 two defendant corporations, and that such New York corporations did not conspire with either of these corporations as charged, with two or more of the defendants, then you should not consider any of the acts which are charged to have occurred on the properties of these New York corporations, or the acts of employees or agents thereof. But if, on the other hand, the evidence satisfies you beyond a reasonable doubt that one or both of the New York corporations was in fact so owned, controlled, dominated and operated by one or both of the defendant corporations; that it had the same officers, and it was in fact [in] its business transactions for all practical purposes identical with one or both of the defendant corporations, the New York corporation which you find so connected you may consider in connection with the defendant. If you then further find that two or more of the defendants conspired as charged with one or both of the New York corporations to monopolize and restrain interstate trade and commerce, you would be authorized to find a conviction as to such defendants; or if you find that the employees or agents of such New York corporations were in fact, as I have stated, employees or agents of one or both of the defendant corporations named in this indictment, and such corporations, if you find them so identical, would be responsible for the acts of such employee or employees if they authorized them, or if they clearly ratified them, such wrongful acts, subsequently, knowing them to have been committed. But you must consider this evidence in connection with all the other evidence in the case, that is, whether there was any conspiring between any two of the defendants with either or both of the New York corporations or their agents or whether said New York corporations, or other agents and employees, were dominated, directed and controlled by any two of the defendants, and that such acts or means alleged to have been committed at the Brooklyn yards were ratified by any two or more of the defendants."

Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court instructed the jury as follows: "The conspiracy, the venue of this offense, will be where the conspiracy was formed; but a conspiracy may be formed by individuals residing in different States, or it may be carried from one district to another, if the objects and purposes of that conspiracy

has a means for transporting or been committed in another district than that — which it was formed.”

80 Defendants, before the retirement of the jury, then and there excepted to this charge, claiming that it was unauthorized by the evidence and otherwise illegal, and they make this exception a part of this bill of exceptions.

Be it further remembered, that the Court erred, against the objections of defendants, that there was no supporting allegation in the indictment, that the means by which the alleged conspiracy was to be effected were a part of the conspiracy agreement and had to be proven as a part of the agreement, and the Government was confined to the proof of the agreement in permitting evidence from various witnesses attempting to show the doing of the acts mentioned in nine of the twelve specifications contained in the said two counts, and defendants then and there excepted in the overruling of the objection of the defendants to this testimony.

Against the objections of defendants, the Court permitted the witness, John T. West, to testify for the purpose of proving the allegation in the indictment, that one of the means by which the alleged conspiracy was to be effected was the coercion of factors and brokers into entering into contracts with the defendants for storage and purchase of their receipts, as to the making of the contract between the West, Flynn & Harris Company and the American Naval Stores Company, bearing date June 1, 1907; the objections being that there was no evidence of coercion about the making of the contract, and that such evidence was entirely irrelevant and illegal. The Court overruled these objections, and defendants then and there excepted.

Against these same objections, the Court admitted the said contract in evidence, to which ruling the defendants then and there excepted.

Against the objections of defendants, the Court permitted testimony from Walter F. Coachman, for the purpose of showing the same alleged coercion touching contract of his company with the S. P. Shotter Company and the Paterson-Downing Company, and the taking over of the said contract by the American Naval Stores Company,—the said contract being dated December 7, 1905. The defendants objected to the admission of such evidence because it did not tend to maintain the allegation in the indictment and the bill of particulars as to any coercion or to show coercion, and was illegal and irrelevant, and defendants then and there excepted to the permission by the Court of the said evidence.

Against the same objections the Court admitted the said contract hereinbefore just mentioned, which contract is dated June 7th, 1906,

81 is between the Paterson-Downing Company and the S. P. Shotter Company, as parties of the first part, the Consolidated Naval Stores Company, the West, Flynn & Harris Company, The Barnes & Jesup Company and Alford Brothers Company. Defendants objected to the admission of this contract upon the ground that it did not tend to show coercion, and, particularly, coercion on the part of the American in coercing the Consolidated Naval Stores Company into entering into the contract, the American Naval

Stores Company not being even a party to the contract. Against these objections the contract was admitted in evidence by the Court, and defendants then and there excepted.

Against the objections of defendants to the effect that such evidence was irrelevant and illegal, and did not tend to prove the allegation in the bill of indictment and bill of particulars touching false gauging, that there was no supporting allegation in the indictment and there was no evidence that defendants were connected with it, and it was otherwise illegal, the Court admitted the testimony of the witness, William H. Hoskins, a witness for the Government, to the effect that, after inspection of turpentine, some of it would be taken out of the barrel. The witness testified, against the objections of defendants, to the following effect: "I do not know that Mr. Moller ever paid any particular attention, but he has been there during the time that this regulating was going on, and my orders from Mr. Woods, who was acting as custodian of the yard, was to always use my discretion, and when the weather was cool, to take about a gallon, and if the weather was warmer, to take out less; however, we always, after the inspectors turned it over to the American Naval Stores Company, why, we always taken out from half to a gallon, and we would fill other barrels and put them in the American Naval Stores Company stock." The objections made to this evidence being that there was no supporting allegation in the indictment, that it did not prove the charge made of false gauging, or that defendants were connected with it, and it was otherwise illegal. The defendants then and there excepted to the Court admitting the said evidence.

Against the objections of defendants, to the effect that the evidence was not warranted by the indictment and the bill of particulars, and no defendant on trial was connected with it, the Court permitted the witness, E. O'Keefe, offered by the Government, to testify to the effect that the grades of a large quantity of rosin in the Brooklyn yards were raised without previous re-inspection. Defendants then and there objected to the admission of the said evidence against the said objections.

82 Against the same objections by defendants, the Court admitted the testimony of the witness, De Groot, to the same effect, and defendants then and there excepted.

Against the same objections by defendants, the Court admitted the testimony of the witness, Clehan, to the same effect, and defendants then and there excepted.

Be it further remembered, that the Court charged the jury as follows: "All the means and all the illegal acts which the indictment charges must have been done within three years prior to the finding of this indictment. Any acts beyond this period you would not consider." The defendants then and there, before the retiring of the jury, excepted to this charge, upon the ground that it was illegal, in that it permitted the jury to consider the acts alleged to have been done prior to the incorporation of the American Naval Stores Company, the only trader mentioned in the indictment, and prior to February 11, 1907, when it appeared that the defendant,

S. P. Shotter, was indicted under the same act and pled [pleaded] guilty thereunder, and prior to the limitations fixed by the bill of particulars.

Be it further remembered, that the jury impanelled in the said cause, after they had been in their jury room considering their verdict for two hours and a half, returned into Court with their verdict, finding the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, guilty on the first and second counts of the indictment, finding the defendant, C. J. De Loach, not guilty, and making no return as to the two corporate defendants and no allusion as to these corporate defendants. The jury was not interrogated as to these corporate defendants, or either of them, and the verdict was received and the jury discharged. The instructions of the Court to the jury covered these two corporate defendants as completely as it did the individual defendants.

That, after the rendition of the said verdict, but before judgment was pronounced thereon, the defendants, now the plaintiffs in error, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, filed their motion in arrest of judgment upon the three grounds mentioned therein, and that on the 14th day of May, 1909, the said motion in arrest of judgment was overruled by the presiding Judge, and to this judgment overruling the said motion in arrest the said defendants, now plaintiffs in error, then and there excepted, and now except, upon the said three grounds, and make this exception a part of their bill of exceptions.

83 Be it further remembered, that in their assignment of errors filed on the 14th day of May, 1909, these defendants insisted and now insist that the verdict is without evidence to sustain it as to these defendants, or as to any one of them, and that it is unlawful and illegal, and that the said verdict is illegal, in that it appears that these defendants are indicted as officers and representatives of the American Naval Stores Company, two of them being also representatives of the National Transportation & Terminal Company, and are charged with conspiracy to restrain trade and conspiracy to monopolize trade for and in behalf of the on-y trader mentioned in the indictment and the only party alleged to be connected with trade of any kind, namely, the American Naval Stores Company, and these defendants cannot be found guilty with the corporations eliminated from the case and ignored by the verdict, particularly the American Naval Stores Company.

Be it further remembered that the following is a full and complete statement of all the oral evidence introduced at the trial:

JOHN W. WEST, sworn on behalf of the Government.

Direct examination:

Between April 1, 1907, and April 1, 1908, I was president of the West-Flynn-Harris Company, doing a naval stores factorage or commission business with a wholesale jobbing business connected with it. It was engaged in the factorage or selling business, having naval

stores branches, in Jacksonville and Savannah, and also in the grocery business in Tampa, as well as Savannah and Jacksonville. I mean by the naval stores factorage business that we receive and sell rosin and spirits of turpentine to exporters, or any one who desires to buy them, and were so engaged during the period that I referred to. During the period named we received at Savannah and Jacksonville naval stores from our customers; and we sold in Jacksonville what we could of our Jacksonville receipts, and diverted the most of it to Savannah because there was not sufficient demand at Jacksonville to sell it there. Th receipts so diverted to Savannah were sold, as I understand, to different ones here, to whomever they could sell it, it was sold to different parties in Savannah to the best advantage they could be placed. The difficulty we encountered in selling either in Savannah or Jacksonville was that

84 sometimes there was not demand enough to take up the stuff by those who bought from us. Just prior to the time named, for some time, I do not think the American Naval Stores Company purchased anything in Jacksonville but what was put on their yard, if it happened to get there through error; for quite a while I do not think they purchased anything in Jacksonville, and they had been regular customers, I suppose, in Savannah as other buyers were up until a certain time, and then they ceased to bid us, as I understand, at both Jacksonville and Savannah, the reason being that our firm refused to sign a contract tendered it, I presume. When that condition arose, our active manager sent for me, and I went to Jacksonville; I think we made two trips to Savannah before we completed a certain contract that was made between our company and that company; I was acting as one of our managers in the preparation of that contract. Here is the contract, which purports to bear date June 1, 1907. To the best of my recollection the American Naval Stores Company began during the first of May, 1907, to refuse to bid for our receipts at Savannah and Jacksonville. Their refusal to buy from us had been in existence for quite a while in Jacksonville, but as I stated before they had bought our stuff that was put on their yard through error; but other stuff they did not buy from us in Jacksonville for some time, and they ceased to buy or bid us during the first of May up to the time we made that contract. I think they have carried out the contract to the letter, beginning to bid on our receipts at Jacksonville and Savannah immediately after it was made. I executed the contract for my company, signing it in our office in Savannah, in the Southern District and Eastern Division of Georgia, on the date it purports to bear date.

As the contract was finally signed, which shows for itself, there were practically three very objectionable features to it. One was we were forced to take it on that company's yards against what we deemed our interest at the time, because some other of the buyers didn't want it on their yards. Another was—it has never been demanded of us though, I must say—that all shipments originating on the Seaboard Air Line, they could have demanded that they go to Fernandina, we preferred it all in Jacksonville; and then the

very, the most objectionable feature, was having to pay \$400 for river stuff that came down, and did not touch their yard, not necessary to, I think it was loaded for a while on the A. C. L. yards, that being right on the river. Those are the main objections that I had

85 to entering into the contract; and I asserted them to Mr. S. P. Shotter, one of the defendants, I think, in his office here in the city, but cannot say whether it was the first meeting, or whether it was the second; but it was only a short time before the contract was executed. At one time Mr. Edmund S. Nash, one of the defendants, was in the office with Mr. Shotter and Mr. J. E. Harris, the superior manager of the two managers of our company (but not superior to me) was with me; I think at one conference Mr. Shotter and Mr. Harris and myself were together. I could not be positive as to what all was said in the way of statements by me to Mr. Nash and Mr. Shotter in reference to our objections to this proposed contract, and in the way of their replies; but the contract was the result of the conference at the time.

Q. I refer particularly to the objections, if any, you urged to Mr. Nash and Mr. Shotter, and what their replies were, before the contract was entered into, at your first interview in Savannah, and then at your second?

A. We asked Mr. Shotter, is my recollection, not to urge that contract upon us. We urged Mr. Shotter, we insisted with Mr. Shotter not to urge that contract upon us, because we did not want to make it for reasons I stated this morning, and we did not think it was the proper thing to do, but stated to him that we would go on and do business with him like we would any other factor, we thought it was out of place, and the negotiations finally ended in that contract, which was the basis which he said he would grant us. That is the best contract he would make, and he would agree to buy our stuff.

Q. What objections did you entertain for your company which you made known to Mr. Nash and Mr. Shotter before entering into the contract?

A. Did I not state that this morning? There were three objections in the contract, objectionable features, and we did not feel like we ought to in doing business make any contract.

I have been engaged in the gathering of naval stores receipts and their sale on the Savannah market in one way and another since 1894, being first with the West Wiggs Co., Peacock, Hunt & West, now the West Flynn Harris Company. I have an idea, but no definite knowledge, of the proportion of the volume of business handled by the different exporters, relatively. Since it was organized, the American Naval Stores Company handles much the larger proportion of the naval stores receipts here and elsewhere in my section.

Q. You have referred to an objection urged by you to the payment of certain \$400 for storage on the yards of the Atlantic Coast Line on shipments originating on the river. I will get you to explain to the Court and jury what you meant by that, just describe it as you can?

86 A. We have some customers on the St. Johns river that ship down the river. Those shipments are loaded on the Atlantic Coast Line and do not touch the National Transportation & Terminal Company, and we therefore did not think it was right to pay on those receipts, that is the storage charges. I did not think it right to pay to either the American Company or to the National Transportation & Terminal Company. I would say that that \$400 was paying something for nothing, for no services rendered.

Cross-examination:

I do not know, and did not say I knew, the proportion of the American Naval Stores Company's business for the year from April 1st to March 31, 1907, and am not in a position to deny that the percentage of the American Company was only 24 per cent of the whole of this port. The contract that I have here, being the one referred to in direct examination, was prepared or caused to be prepared by Mr. Shotter and Mr. Nash on the part of the American Naval Stores Company, so far as I know, and Mr. J. E. Harris and myself on the other. I think after we went over the contract that Mr. Shotter had tendered us that the physical preparation of this paper, the typewritten matter, was possibly done in our office, that is the original from which this was taken, possibly Mr. Shotter and Mr. Nash and Mr. Harris and myself were together.

Q. You gentlemen had a conversation, and after you agreed pretty well, this paper that you now submit as the contract was prepared in your office?

A. There was another paper, and this left out one or two of the objectionable clauses, and this was the one that we finally wrote up, and I still tried to get the \$400 charge off.

Q. I am coming to that in a minute. I am just trying to find out that particular paper which you gentlemen agreed upon was prepared with the final changes in it in your office, that is true, isn't it?

A. There was one change that we still wanted, and I still contended against. There were so many interlineations in the paper that we had up in Mr. Shotter's office that we had to mark out a lot of them, and wrote this up, and I still hoped to cut off that charge. This particular paper that we finally signed was not prepared by a gentleman in our office, not by us; I think one of our stenographers wrote it up from that, but as I said I still hoped to cut off the \$400.

87 The word "storage" was interlined before it was finally passed upon, I reckon; and the writing looks somewhat like my own.

Q. You were engaged in the naval stores business in Jacksonville and you came twice to Savannah to see these gentlemen here to get them to buy naval stores through you, that is true?

A. I came here having business here.

Q. I understand that?

A. Without coming on that purpose.

Q. But when you were here you did yourself the pleasure of calling upon them to see if you could not get them to buy naval stores from you, that is true, isn't it?

A. No, sir; you do not take it right, do not put me in a false light about that. Mr. Harris, our manager, had made arrangements, I think, with Mr. Shotter to take this matter up with him, and I am not sure whether I went to Jacksonville and came from over there, possibly I did, as I often had business there. I can't say that it is entirely a correct statement that I came twice to Savannah to get the American to buy from us; I came here at the request of Mr. Harris at that time. This matter had been pending for some time, and I think, well I know, it was stated to me by our other manager that one contract or more, at least one, had been tendered in Jacksonville, and that was some time before this was passed; but I know little about it except his statement.

Q. I am asking you this simple question, my dear friend, if you did not tell us that you twice came to Savannah to get the American Naval Stores Company to buy your stock?

A. I came here with a view to try to arrange for them to deal with us, and not to ignore us, because we wanted their good will. They handled such a large proportion of the naval stores we wanted to sell them because very often they are in the market when others are out of the market, and of course we wanted to remain friendly with them and do business with them. Of course we wanted them to buy naval stores, we want everybody to buy them that wants to buy them from us.

Q. You found with your business in Jacksonville that there was not sufficient demand for your stock in Jacksonville, and therefore you turned to the superior facilities of this city, that is the fact, isn't it?

A. Without the demand of the American Naval Stores Company there is not enough demand to take the stuff because they control such a large proportion of it, and when they quit business there we did not have demand enough in Jacksonville to take our stuff, but just as soon as they began to bid us under this contract they took all we received.

88 Q. When they did not see fit to buy in Jacksonville then you turned to Savannah, and you know it to be the fact that for purposes of exportation the advantages of this port are very much greater, you know that?

A. The freights are cheaper than to Jacksonville.

Not being posted as to the harbor's condition, I do not know that for foreign export trade there is only about 18 or 19 feet on the Jacksonville bar; I have heard it was more than that; and I only know from what I see published that here ships go out loaded 27 feet.

Possibly our water facilities are not as good as those of Savannah, I am not positive of that because some ships are very large ships going to New York from Jacksonville; possibly the facilities for the export trade are better here than in Jacksonville; the government has spent a great deal of money in this port, to deepen it; possibly they are, I could not be sure of that fact though because I am not posted on the matter.

As a merchant I know in trade that sometimes a man does not

buy, and sometimes a merchant will buy from one drummer, and he won't buy from another. We were under no compulsion to sell our naval stores to the Patterson Export Company at a fixed price.

Q. You were under no compulsion to sell to the American Naval Stores Company at any fixed price, were you?

A. Well, at the same bid under this contract I had to sell to them.

We are not under compulsion to sell to the American Naval Stores Company at a fixed price, and under no compulsion to sell on a given day. I am aware of the fact that Farie & Co. were buyers of naval stores in Savannah.

Q. You were aware that the London & Savannah Company were buyers here, and the Patterson Export Company at that time, you know that they were buyers?

A. In Jacksonville.

Mr. J. R. Walsh, Mr. T. T. Chapeau, and Mr. E. R. Middleton were buyers here, and I was under no compulsion to sell to any one of them, but could have sold to any of them. We could have sold the products that we had in our hands to anybody anywhere in the world that would buy them.

Q. When you came and saw these gentlemen about making this contract, Mr. Shotter and Mr. Nash, of course, never made any threat against you?

A. I cannot say they did except this, I suppose—well, I know from what was said if we did not go into this contract they would not buy our stuff, nor bid on our stuff unless we made this
89 contract and put our stuff on the Terminal yards in Jacksonville.

The only thing was unless we would put the goods that we were to sell on their yard, why they would not buy from us. The fact is that as a factor we had naval stores on hand for sale in Jacksonville, wanted to sell them as a good factor to the very best advantage for our patrons, the American Naval Stores Company were a large buyer, and declined to buy from us unless the naval stores were delivered in their yard, saying "Well, now, if you will deliver them in our yard we will go into the contract with you to pay you the market price, and will treat you just like we treat everybody else."

Q. That is the fact? Well, of course, they had no power, and did not attempt to exercise any power to force you to do this except to say they would not buy from you. That is the whole of it, isn't it? In a word, as a gentleman, you know that they could not have forced you to have done anything?

A. That is rather a hard question to answer.

Well, they controlled such a large proportion of the business, without them in the market, and without having their good feelings and friendship it is a question, receiving as much stuff as we do, whether we could handle it and sell it to advantage.

We handle a great deal of stuff, and we wanted the good will of quite a large buyer.

Q. That was it, and you gentlemen met very pleasantly about it,

and the point of difference was this: they had a naval stores yard, and they said "Now, we won't buy from you, Mr. West, from your company, unless you put the naval stores on our yard?"

A. Yes, sir.

Q. And you wanted their good will; you wanted to get them as a bidder in the market, and you wanted to sell to the best advantage, and you made that contract to that effect?

A. That being the best we could do under the circumstances.

I can't say that I have always done the best I can in every trade, because I have seen opportunities where I could have gotten more for things from others than I accepted; but, for instance, if you had sent me 100 barrels of rosin and 10 or 15 barrels of spirits to be sold, I would sell it for the best price I could get. We wanted to get from the American Company the best price we could for the goods that we had on hand as a factor to sell, that is the simple truth of it. When we were talking with Mr. Shotter and

90 Mr. Nash about making the contract they practically told us that they would make with us the same contract that they had made with the Consolidated and with the Peninsular Company and with Mess. J. P. Williams & Co., and they said they would treat us like they treated other people. I remember Mr. Shotter having said that he would treat us like he did other people, and so far as I know, and I have been told by our manager that he has done so, never failed to treat us like he did the others in buying. I have been informed by our manager that they have lived up to the contract, and when I was there it was true. When we went to them to enter into this agreement to buy our naval stores they told us they would treat us like they did others, I think that was about the language Mr. Shotter used; and I understood by that they would make the same agreement to do the same things, and would not discriminate between anybody. They have lived up to the contract, which is still in force, and so far as my part of the transactions with them our relations have gone along very pleasantly under this contract, because I know nothing to the contrary.

It does not come within my knowledge that we were offered 25 cents a barrel more for rosin on our yard than over there on the Coast Line yard; I am not always there. Operators or producers having goods on your yard down there have a perfect opportunity of seeing their stuff, everything is open and above board, and I understand that everybody that is interested can go on the yard. I have been on the yard myself in time, but not right recently, but the yard seemed then to be in pretty good shape. I have never heard any complaint about the service afforded us, or about trouble in getting our goods.

Under the contract the American Company was to be paid three cents a barrel for rosin and four cents on turpentine for what is called the initial storage, the usual charge; it would have cost us the transfer charge in addition to move the stuff we received by the river up to the yard. I did not make the proportion that in place of putting it at the yard and paying the transfer charge we would pay a lump sum of \$400, it was rather demanded of us by the

American Naval Stores Company. My recollection is that we preferred that lump sum for the first year rather than have it by the barrel, we knew then what we had to pay for the first year, we preferred that rather, but that was against our wish about it. We thought that we ought to have service rendered for what money we paid out. We agreed to the \$400 for the first year in lieu of the transfer charges, but against our wishes. I do not know
91 whether the suggestion of the \$400 came from me or Mr.

Harris, but any way we did not want to transfer that river stuff over there because we thought it would cost us more than that to transfer it. We did not want to pay it, because we did not think it was right to demand it of us in face of the fact that it was put on another yard, and no services were performed for it. I think one of us, that is Mr. Harris or myself, suggested that we rather pay \$400 and know that we were going to pay than to stand the transfer charges over there, and then the storage charge after it got over there. So far as I know, and I have been so told by our managers, the American Naval Stores Company never required us, under one of the articles of the contract, to send to Fernandina such naval stores as we might in any way receive or control which originated on the Seaboard Air Line Railway, and to be handled by us in Jacksonville or at Fernandina. Had they required it, it would have necessitated our having an inspector at Fernandina, and we rather urged them not to require it of us for one reason, and I think that is a good one, we had a good man, had been with us for years, and he became our inspector, and we wanted to give the work to him to increase his salary.

Redirect examination:

I think Mr. Shotter suggested the provision of the contract to which I have just referred as to the shipment to Fernandina of receipts originating on the Seaboard Air Line. I objected, stating that I preferred to give the inspection to a good man who had been with us for years, and then we wanted all of our business right there at home. That particular provision of the contract has not been enforced. The transfer would have been made by, and the transfer charges would have gone to, the railroads I suppose. I don't know that the National Transportation & Terminal Company has any right to any transfer charges from the Atlantic Coast Line Railroad yards to their yards. The initial storage for a barrel of rosin is three cents, and four cents for spirits; and the charges were the same at the Coast Line yards on stuff originating on the river and going down to the Coast Line yards.

After we diverted to Savannah the American Naval Stores Company, before we entered into the contract, finally refused to bid or buy stuff from us here as well as in Jacksonville.

No distinction whatever that I know of existed between the quality of our turpentine and rosin and other factorage companies making offers on this market. I do not know that the defendants or
92 the National Transportation & Terminal Company had any storage yards in Savannah. I think possibly they have some

tanks here. The rosin goes on the yards of the railroads here. I think the American refrained nearly a month from purchasing from us after our diversions from Jacksonville began. I could not answer definitely approximately what quantities of our receipts were shipped here.

Recross-examination:

I know from my information that there was deeper water at Fernandina than at Jacksonville; I understand Fernandina has quite a good harbor. Naval stores going from the yard over to Fernandina would of course have to pay the freight charges, that is the freight charge from Jacksonville to Fernandina. I do not know whether a portion of those goods would be shipped through Fernandina from Jacksonville. I can't say that I know that one of the considerations for the payment of the \$400 was to cover the expense of the movement of naval stores from the Jacksonville yard to Fernandina. I do not remember that these gentlemen, when we were discussing the \$400 charge, said that they had to keep up these yards, and the \$400 would contribute to the expense account to which they would be put in transferring from the yard in Jacksonville to the deeper water at Fernandina. I remember there was a transfer charge from the river to the yards, and, of course, if they shipped from Jacksonville to Fernandina they would have to pay a transfer or freight charge.

Redirect examination:

I do not know where the rosin and turpentine stored on the National Transportation & Terminal Company's yards at Jacksonville would have been sent for export, whether to Fernandina, or to any other place.

H. L. RICHMOND, sworn on behalf of the Government.

Direct examination:

From April 1, 1907, to April 1, 1908, I was secretary and treasurer of the West Flynn Harris Company. I know that there were conferences, how many I don't know, between Mr. West and Mr. Harris, with either Mr. Shotter or Mr. Nash, prior to 93 the signing of that contract, and I myself saw Mr. Shotter on two occasions, and Mr. Nash on one occasion with reference to the verbiage of the contract. I was not present at either of the conferences between them. The conferences I had with them was simply with reference to the verbiage of the contract, being the objection that the West Flynn Harris Co. had to some of the terms of the contract, one of which was the payment of that \$400 for water receipts that were not to go on the premises of the National Transportation & Terminal Company. There was one other point that I saw Mr. Shotter about, simply carrying the message from Mr. Harris and Mr. West to Mr. Shotter, and I stated that if certain passages of the contract were changed that the West Flynn Harris Company were ready to sign the contract. Mr. Shotter at the time evidently

was of the opinion that I was stating objections myself, he was a little perturbed about it, and said that he would not stand any dictation from me, and they could sign the contract or not as they saw fit, rather his words were that they could sign the contract or leave it. I think the contract was signed that same afternoon. The contract had been the subject of negotiations between those companies about a year. It had not been made before, because the company did not want to make any contract. So far as I know myself, and can recall clearly now, any reasons which our company entertained which were communicated to Messrs. Nash and Shotter, the main objection was about that part of the contract referring to the payment of storage charges on stuff that did not go on their yards. There was something else in the contract that I spoke to Mr. Shotter about, but I do not recall now, it may have been changed, it may not have been, it was a part of the contract, but I do not know.

Q. Without regard to the details of the contract what objection, if any, did your company entertain which, within your knowledge, were stated to Mess. Shotter and Nash, or either of them, to making the contract at all in any form?

A. They objected to the \$400 payment of storage, or objected to the payment of storage on stuff that did not go on their yards. They objected to any contract at all, did not want to enter into any contract. I think I recognize the superior facilities of this port for the sale and distribution of naval stores. I handled the selling end of the West Flynn Harris Company's business here. We received no bids on the Savannah market from the American Naval Stores Company between the 7th of May and the 3d of June, previous to the making of this contract, 1907. After the making of the contract the same treatment was accorded our company by the American Naval Stores Company as was accorded any other factor-
94 age concern in Savannah.

Cross-examination:

At the time of the making of this contract in June, 1907, there were quite a number of buyers in the Savannah market.

Q. And among them was the Standard Oil Company, quite a large buyer, wasn't it, of naval stores?

A. They are large buyers here at times, there are times when they are not in the market. But they have an office here, and are recognized as buyers of naval stores.

JOHN E. HARRIS, sworn for the Government.

Direct examination:

From April 1, 1907, to April 1, 1908, I was vice president and one of the managers of the West Flynn Harris Company. Early in 1907 there was negotiation commenced between our company and the American Naval Stores Company in reference to a proposed contract for the storage of our Jacksonville receipts on the yards of the American Naval Stores Company. We had been diverting our stuff to Savannah up to that time; I suppose more than half of our

Florida receipts were coming here at that time. Prior to that time, we had not disposed of much stuff in Jacksonville from the spring of 1906 in Jacksonville and that which we disposed of there was bought principally by the Atlantic Naval Stores Company and the Paterson Export Company. Now and then there would be a car go by mistake to the American Naval Stores Company's yards, and Mr. Oliver very kindly would take them off our hands; but other than that they did not bid on our stuff during 1906, from the spring of 1906, and we diverted most of it to Savannah. I am not positive that they failed to bid on our stuff here for the whole month of May, 1907, prior to the making of the contract, but they failed to bid on our stuff along about that time.

Q. If you know from them why they refused to bid for your stuff, please say so?

A. They wanted us to sign a contract. I do not know whether I stated to either Mr. Moller or Mr. Nash or Mr. Shotter our objections to signing that contract. I had a conference with Mr. Shotter in his office; I think it was pretty well understood that we did not want to sign the contract.

95 Q. Who took this matter up with you first, who was the first one of these defendants to take the matter up with you or your company of signing this contract?

A. It is my recollection that Mr. Richmond, our manager, informed us that they were not bidding on our stuff in Savannah, and Mr. Flynn and myself came up to see them in regard to it, and we had a conference with Mr. Shotter in his office in regard to it.

I do not recall that I had ever had a conference with either one of the six defendants prior to that time in Jacksonville in reference to it. I think there was a proposed contract the subject of a conference between me and Mr. Carl Moller in Jacksonville before that time; I think Mr. Moller—this was 12 months previous to that—he informed us he would not take our stuff in Jacksonville unless we signed this proposed contract; they took our stuff in Savannah for about 12 months after, though. We signed this contract twelve months later than the time Mr. Moller notified us they could not take our receipts in Jacksonville.

Cross-examination:

These gentlemen offered no threats against me, they did not attempt any violence upon my person. We entered into this as a business contract, it has been lived up to ever since. I am familiar with the yard of the National Transportation & Terminal Co. at Jacksonville, and have been down there several times. So far as I know it is properly kept and open to inspection. They have been reasonably prompt in giving us our goods that were there stored at any time. At the time of my conversation with Mr. Shotter, in regard more especially to the matter of \$400, it is not true that they insisted that in the transportation from Jacksonville to Fernandina they would have to pay the charges, and that this \$400 would contribute in part to that expense. As to the payment of the \$400 Mr.

Shotter said at that time that he required that of the Consolidated Naval Stores Company, and he desired to treat all of us alike.

Q. And he told you that the same contract was with the J. P. Williams Co., the same relations existed between the Peninsular and the Patterson Export Co. and the J. P. Williams Co., or the Consolidated?

A. It was my understanding that the same. The statement that he made was that he would show no discrimination about it between the different gentlemen.

96 Redirect examination:

I visited the yards of the National Transportation & Terminal Company in the years 1907 and 1908, and found them about the same as others. I understand Mr. Mike Woods was the custodian of that yard. I have never been down there on Sunday or on a moonlight night.

C. H. BARNES, sworn for the Government.

Direct examination:

I am in the naval stores factorage business. By naval stores I mean turpentine and rosin. The various branches of the naval stores industry are the manufacturing of spirits of turpentine and rosin, and the making of tar. The manufacturers of spirits of turpentine are commonly known as naval stores operators. I am in the naval stores factorage business, and also engaged in operating one or two places. The manufacturing or operating, and the rosin and the spirits are the branches of the business that I know anything about. The factorage end, in which I am engaged, is a department of it. The distributing end of the business is known as the exporting or sales end. I have been engaged in the business directly and indirectly 26 or 27 years, and worked in nearly all departments of it. I have worked in the woods in the manufacturing business, I worked in the office of a naval stores factorage business, traveled on the road in the interest of a naval stores house, and I have done a little of all kinds of work in the office; I never distilled any turpentine. I have had very little experience directly in the selling end of the business, exporting or distributing; my company did market its receipts, but it was mostly in the domestic way what time we did it. I mean that we did not do any foreign business, it was a domestic business right here in the United States. Our foreign business consisted of a shipment or two to Hamburg, I believe. My company was also connected with the Patterson Company; I was a director also in that company; I am still a director, but only in name, the company not being in existence or engaged in business now. The factorage business is a business for the purpose of aiding the operator in manufacturing turpentine, and in receiving his shipments, and selling them to the exporter or other dealer. My company is located in Jacksonville, with a branch office in Savannah. Savannah is one of the markets at which the American crop is disposed of by the factorage companies; also Jacksonville, Pensacola. Mobile, New Orleans. Pensa-

cola or Tampa is not a very desirable port because it is not a basing point by any means. "Closed port" as used in the indictment means where there is no market except market based on Savannah. Tampa, Pensacola and Fernandina are closed ports. Savannah is the market of the world for naval stores, the basing market for the world. If the Savannah market has declined from 65 cents to 35 cents, the other markets decline accordingly, according to whatever their basis is. If the Savannah market advances the Jacksonville market advances accordingly. I know some of the gentlemen in the American Naval Stores Company, and know the company. I have had very little familiarity with their purchases on the Jacksonville market because I have not sold them but very little stuff. We marketed our stuff until right recently through the Paterson Export Co., and by shipping it to Savannah. I have very little knowledge of the naval stores industry outside of Florida and Georgia. I am not really well posted, but it has been my idea that the American crop of naval stores for the year 1907-8, from April 1st to April 1st, amounted to about 600,000 barrels. My first connection with the naval stores industry was in the manufacture of the naval stores, and have been connected, I suppose, with the operation of at least 20 to 25 different places in my life as an operator, and later connected with the factorage business, and an export company or two. I have been connected with two factorage companies, and worked with one factorage company a little while ago, I was connected with its directory. I was connected officially with two factorage companies, and I used to work for a factorage company before I went into the factorage business myself. I am now and have been since April, 1902, president of the factorage company. I have been connected with two or three exporting companies, selling companies. I was connected with the Barnes & Jesup Company when it was selling its own receipts, and later I was director in the Naval Stores Export Company, and after it went out of business I was a director in the Patterson Export Company. Those were companies engaged in the selling of naval stores. The American Naval Stores Company is engaged in the naval stores export business. I mean by exporting the selling of rosin and spirits to the domestic and foreign trade. In the course of my business, factorage business, or in the selling end of the business, during my connection with Patterson Export Company the Naval Stores Export Company or the Barnes & Jesup Co. selling department, I was selling in competition with the

98 American Naval Stores Company; we had to meet the competition that was offered by all.

Q. What knowledge during the last three years prior to the return of this indictment, which was in April, 1908, what knowledge, if any, did you have in reference to the receipts at the various ports, the sales and the distribution of naval stores generally by the exporters?

A. Only from my knowledge of the different receipts at the different ports, and from what knowledge I had of the amount of stuff that was handled by the different companies. I knew what was going on in the markets. I certainly had knowledge or acquaintance

from day to day, week to week, and month to month with market conditions at Savannah and in Jacksonville, the principal ports. My means of keeping up with the quotations was due to the fact that we were receiving naval stores and selling them daily in the commission business, and the exporting companies or the selling companies that I was connected with were buying naval stores and selling them at Jacksonville and at Savannah. At that time the American Naval Stores Company was buying and selling naval stores at Savannah and Jacksonville, Pensacola, Brunswick, possibly, and Tampa. The turpentine producing States are North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and a little in Texas. I have not done any naval stores business in North Carolina, where I was raised, but not engaged in the naval stores business directly. I have knowledge or information of the naval stores industry in that State only from observation. I know something about the naval stores industry in North Carolina, where I think they manufacture at least 20 to 25 thousand barrels annually, the bulk of it being sent to Wilmington. I do not think that South Carolina produces more. I have no knowledge of the territory west of Alabama river, that is Alabama, Mississippi, Louisiana and Texas, except through business association and men who are in business with me, not having been in those States. I have been through Alabama, but know very little about it.

Q. What source of information have you in reference to the naval stores business in those States, timber, the amount of the product, the character of it, where it is shipped, and so on; just go ahead and tell this Court and jury your information, if you have any?

A. I have very little information about Alabama, none that I could give an opinion on. I have never operated in that part of the territory at all; we did maintain an office a while at Pensacola, and got a few of the shipments from Alabama, but not much.

99 There was a good deal of the product of Alabama that goes to Mobile, I could not say what part.

I have very little knowledge of the industry in Louisiana, but through an associate of mine, who is operating a place over there, and other men whom I come in contact with who operate there; it is all hearsay. The same is true about Texas and Mississippi. The Alabama receipts are shipped to Pensacola, Mobile and Gulfport, I believe; I don't know any other ports for them to go to. I do not know where the Louisiana shipments go. In conducting the factorage business, and particularly as a director in those two distributing companies, and having been engaged in that business myself, I have not had any knowledge of or taken any account of the receipts, shipments and purchases of the crop in those States other than Georgia and Florida; I have not been connected with that department of the export companies that I was with, I had nothing to do with making sales or contracts; the management of the business was in the hands of other people, that is I was only a director, and was not active in the management of the business other than just being a director. That was true as to the Naval Stores Export Company and the Patterson Export Company. I do not mean that I

had no knowledge of the business at all; I mean that the only knowledge I had of it was just simply as a director, but not as one of the managing officers of the company. I said I did not believe that the crop was more than 600,000 barrels of turpentine, and 1,800,000 round barrels of rosin. I made that up in my mind that that was the production of naval stores for that period of time from the receipts of the various factors, with which as a rule I kept informed approximately enough, being done in the course of my business as a factor and producer; that is the only way that I could get at an opinion, and it would simply be an opinion, and not something that I could swear to. I should say that about 60 per cent. of the entire crop is produced by Georgia and Florida.

I am familiar with the location of only one of the yards of the National Transportation & Terminal Company; I know they have yards located at Jacksonville, Fernandina, Tampa and Pensacola. I do not mean to say that they have not other yards, but I have not been to the places where they have other yards. I have no knowledge of either the National Transportation & Terminal Company or the American Naval Stores Company having any terminals or tanks in Savannah, I have not been informed, if they have. It has been some little time since I made the figures as to the cost of producing a gallon of turpentine under average conditions of average places, with the average price of the rosin during the year April, 1907, to April, 1908, but I figured with two or three or four prominent operators, who had kept strict account of it, and I think our conclusions were at that time that it cost about 52 cents. About July or August, 1907, my company, the Barnes & Jesup Co., opened an office in Savannah to divert our consignments to Savannah, and I suppose until in the early part of 1908 we must have shipped, 60 per cent. of our receipts came direct to Savannah instead of going to our Jacksonville office. I suppose that would be 15,000 barrels of turpentine and 40,000 barrels of rosin, or 45,000.

Q. In the light of your business experience as an exporter, factor and a producer, I will ask you to say what effect was produced upon the Savannah market by those diversions?

A. The diversions to Savannah would, of course, make it harder to take care of the receipts here than if the shipments had gone otherwise; in other words there were more shipments to Savannah to be taken care of in Savannah by the Savannah market by these diversions than there would be if these shipments had not been diverted. The effect would be a tendency to lower the Savannah market if the shipments were increased.

Cross-examination:

The cost of a production of a gallon of turpentine depends upon varying conditions, as, for instance, what it costs the operator for his timber in the first instance, the varying price of labor, the varying cost of rations or supplies for his stock, and the distance he has to haul it, so that it is true that one man will produce turpentine under more favorable conditions at a lower price than it would be

produced by some one else under less favorable conditions. We opened an office in Savannah because the facilities in handling our product were better than they were at Jacksonville, and it was done, of course, to satisfy the customers who were shipping to us. When I say that supplies shipped to a given market would have the tendency to lower the market, I mean at the same time to say if that is the best market to ship to then as a factor I ought to ship to the best market. I could not say whether it did or did not lower it; my idea is that where the supply is greater than the demand the tendency is for a lower price.

101 CHARLES E. SMITH, sworn for the Government.

Direct examination:

I live in Brooklyn, N. Y., and am a naval stores inspector. My father was the man in the United States who for 50 years made the particular form of type on which rosins are inspected, and I have carried it out ever since. Rosins are classified into fourteen grades, the distinguishing difference between the grades being the color. There are three shades. I have a copy set from my original. Rosins are classified in the United States by the standard, and I have in my hand one of the standard sets, being cut by me from rosin and prepared four or five days ago. If we had 500 barrels of naval stores to inspect and classify, we would open the heads of the barrels, or rather take out the heads and cut down six or seven inches into the rosin, and draw a sample, and get a seven-eighth cube, it is supposed to be seven-eighths, but as long as you have a slide seven-eighths thickness it will stand the law. If I had 500 barrels I am supposed to go through the whole of them, sometimes I only take ten per cent, and grade the samples therefrom with these types. The grades are A, B, C, D, E, F, G, H, I, K, M, N, WG, and WW, and sometimes I use the cross WW. The highest grade is WW and the lowest is A. I guess the Savannah and Pensacola inspectors use the set of standard type made by me upon which to classify rosin. This is the set of standard type. I am in the employ of Geo. L. Hammond & Co., of New York, naval stores yard. I am not in the employ of the American Naval Stores Company, I only go down there as I am called to go for them.

Cross-examination:

It is a fact that all over the world where rosin is sold it is sold according to this standard type.

Q. So that it does not make any difference what the inspection down in Jacksonville, or here in Savannah is, when it comes to be sold, it is sold by this standard type, that is a fact?

A. Yes, sir.

It follows that if it is found a barrel of rosin grades a low grade by the actual type, it is so sold in the market according to this type without reference to what the grade in Georgia or Florida was; just as I find it I sample it. The way I understand it is that it is sold

that way, and the seller is not bound by the previous inspection, nor is the buyer bound by it, but it is sold according to the standard type which I furnish to the trade.

102 JOHN F. GLATIGNY, sworn for the Government.

Direct examination :

During the naval stores year beginning April 1st, 1907, and extending to April 1st, 1908, I was supervising inspector in the State of Georgia. I have here, and hand to you, reports by the American Naval Stores Company to the supervising inspector of their purchases on the Savannah market for the months of January, February and March, 1908. Result of statement appears in documentary evidence.

Cross-examination :

Every factor and every purchaser makes reports to me every month. No refusal upon the part of the American at all, everything perfectly open and above board. It is my business as supervising inspector to be, and I am, familiar with their storage of rosin and spirits here; and the conduct of the business is perfectly open. I visited the yards every day for the purpose of seeing that there is no wrong committed, and as the result of my inspection I do not know of any wrong committed by them there, or anything out of the regular business in the way of repacking turpentine or in regarding rosin.

Redirect examination :

The railroads own and control the naval stores yard here, there being no private yards in Savannah that I know of. The yards and spirit tanks of the American Naval Stores Company or National Transportation & Terminal Company here are located on railroad property, controlled by the railroads, and are public yards.

Recross-examination :

I mean to say that a portion of the property of the railroads is set aside to you for your yard.

Q. And we are in control of our own property, though it is on the domain of the railroad; in other words you go there and inspect freely this property where this naval stores is stored by us?

A. Yes, sir.

I have never seen anything wrong committed by these defendants; if I had I should have called attention to it; that is my business.

103 Redirect examination :

I do not mean to say that any part of these public yards is set aside to any particular exporter, it is all under a common shed, the sheds are numbered, run so and so, and it is a common shed, and everybody's stuff is under there.

Q. And no part of it is set aside to "we," "us" or "us and Co."?

A. I understood him to mean by that the naval stores business generally.

Recross-examination:

The naval stores belonging to the American Naval Stores Company are touch and touch with the stock that may belong to some other factor; each lot is numbered and to itself, each lot is numbered, so many barrels, such a date, and such a year, and is to itself, although they are all under the same general sheds.

M. A. BROWN, sworn for the Government.

Direct examination:

During the first three months of 1908, I was supervising inspector of naval stores for the State of Florida. As such inspector the American Naval Stores Company made reports to me of their purchases at the port of Jacksonville, and I hand you such reports for the months of January, February and March of 1908. The Fernandina and Tampa purchases of the American Naval Stores Company are reported through the Jacksonville office, and the Pensacola purchases are reported direct from Pensacola.

E. C. PATTERSON, sworn for the Government.

Direct examination:

I have examined what purport to be the reports of the American Naval Stores Company for the months of January, February and March, 1908, to the supervising inspector at Savannah, and what purport to be the reports of the American Naval Stores Company to the supervising inspector of Florida at Jacksonville of the 104 purchases on the Jacksonville market during the same period, and have figures or calculations as to what those figures are. The purchases of the American during those three months in Jacksonville and Fernandina were 11,332 barrels of turpentine, and 46,963 barrels of rosin. The Fernandina receipts are not reported to the supervisor as kept separately from Jacksonville; the two places are bid for as all Jacksonville. During the same period the American Naval Stores Company purchased on the Savannah market 2066 barrels of turpentine, and 28,826 barrels of rosin. At that time the Savannah market was being depressed.

Cross-examination:

When the American paid its inspection fees I think its reports of the Jacksonville market included Jacksonville, Fernandina and Tampa. In the amount of purchases made by the American Company in Jacksonville for the first three months I included Jacksonville and Fernandina, but omitted Tampa which is a closed port, and where the American Company took the stuff anyhow. I do not think the inspector's report shows that the receipts at Tampa

bought by the American were included in the two numbers furnished. The purchases at Tampa may possibly have been included in those figures. I do not think I am qualified to state that the figures I gave are made up of the purchases at the three ports, Jacksonville, Tampa and Fernandina; it was my understanding that Tampa was reported separately. The fact that Tampa was a closed port did not prevent you from buying at Tampa. I made these figures from those reports there, one of them has a pencil memorandum referring to Tampa, but the other two have not, I took it, I understood that it was Jacksonville and Fernandina, and that Tampa was made separate. I did not include Tampa that I know of, but do not know whether I did or not.

Redirect examination:

The reports for February and March apparently refer only to Jacksonville, and speak for themselves as to the actual purchases for the separate months. On the report for January there is a pencil memorandum, Tampa, that perhaps means in making up this report to pay the supervisor his fees, they have included Tampa also on this one. Apparently the American Company's purchases at Tampa were included in the January report, judging from the fact that they put the word "Tampa" at the top. There is nothing on the report that would enable me to distribute the purchases made at Jacksonville and Tampa for the month of January.

M. A. BROWN, recalled for the Government.

Direct examination:

The pencil memorandum "Jacksonville, Fernandina and Tampa" on one of the reports was just simply put there by me in sending out these duplicate blanks to the American Naval Stores Company for their monthly statements with the location of places where they did business. This report as I understand it represents purchases of the American Company through its Jacksonville office of receipts at Jacksonville, Fernandina and Tampa. I stated when on the stand before that Jacksonville, Fernandina and Tampa sales are reported to me through the Jacksonville office of the American Naval Stores Company. I have nothing by which I could tell exactly the different receipts as purchased in Jacksonville and in Fernandina and in Tampa; the Jacksonville office reports to me on this blank their purchases. The only way I could tell which were Jacksonville and the different localities receipts are only parties from whom they buy as noted in here. For instance I know the Consolidated Naval Stores Jacksonville are Jacksonville receipts. The total turpentine purchases appearing on this report are 3312 barrels.

Q. Please glance at it, and see what purchases, what part of that number was purchased at Jacksonville and Fernandina?

A. 949 casks purchased from the Consolidated, there were 618 casks purchased from the West, Flynn Harris Co., 114 from the J. P. Williams Co., Jacksonville office, and 1631 purchased from the

Peninsular Naval Stores Company which includes the Fernandina and Tampa receipts of the Peninsular Naval Stores purchased by the American, and also the Jacksonville receipts of that company.

The Tampa receipts are represented in the 1631 reported as being purchased from the Peninsular. I do not know that I could tell what part of that 1631 was bought at Tampa; I could refer to the Peninsular reports, I may have it there, as to the parties they sold for that month. The reports for March and February are in the same basis. The Jacksonville purchases, including Fernandina, for February would be 1818 casks from the Consolidated. 1132 from the West, Flynn Harris Company; 134 from the J. P. Williams Co. There is also on this report 647 casks purchased 106 from the Peninsular Co., which includes Fernandina and Tampa and Jacksonville receipts of the Peninsular. The March report represents the purchases of the American at the three points. The purchases at Jacksonville and Fernandina, as near as I can determine from those figures, 1448 casks from the Consolidated at Jacksonville, 1596 from the West, Flynn Harris Co., Jacksonville, 76 from the J. P. Williams Co., 1059 from the Peninsular which represents the Peninsular's receipts at Fernandina, Tampa and Jacksonville.

Cross-examination:

I do not know that the American is restricted at Fernandina in their purchases to the Peninsular.

Redirect examination:

There are no sales at all at Fernandina that I know of, they are handled through the various Jacksonville offices.

WALTER O'KEEFE, sworn for the Government.

Direct examination:

I live in Brooklyn, N. Y. from April 1st, 1907, until along about April 1st, 1908, I was foreman of the rosin yard of the National & Transportation Company in Brooklyn, N. Y. Mr. Percy Ketchum was the manager of that yard. I couldn't tell what relation he bore to the American Naval Stores Company. Rosin, turpentine, tar and pitch were stored on that yard during the period of April, 1907, to May, 1908, while I was there.

Q. Do you know whose rosin that was at any time, any of it?

A. The American Naval Stores Company.

The number of barrels passing through those yards under my eye during that year approximately averaged 150,000. I do not know from whom Mr. Ketchum received his instructions. Those were private yards, as I understand, and no rosins other than those owned as I have stated were handled on those yards. I was present when the lease or contract for the use of the property on which these terminals were afterwards located were closed. I was in the office of the American Naval Stores Company in New York on March

11th, 1907; Mr. Dill, who as I understand is the manager of
107 the American Naval Stores Company in New York, Mr. Stevens the manager of the turpentine department of the American Naval Stores Company, and Mr. Hinman, manager of the estate of Wm. Beard, the owner of the property; and they agreed in my presence to accept the property. After striking out a couple of clauses "we will take the property" said Mr. Dill, "we agree to that contract." I was informed by Mr. Hinman, manager of the estate of Wm. Beard that the American Naval Stores Company were about to engage this property to start some naval stores yards there. I went over to New York, and Mr. Hinman went with me down to the office of the American Naval Stores Company, and he introduced me to Mr. Dill; he said "This is Mr. O'Keefe, a gentleman who has been with us for 32 years, and who is a good man for your business." All right, said Mr. Dill, and he asked me what salary I wanted. Mr. Dill asked me that, the manager of the American Naval Stores Company in New York. At last he hired me for \$30 a week, but he says: "I cannot confirm the agreement between you and I until Mr. Boardman, the treasurer of the American Naval Stores Co., comes in. Mr. Boardman is right down there in court. He came in a little while afterwards, I waited there till he came in, and Mr. Dill introduced me to Mr. Boardman; Mr. Boardman says "All right, we will take him." They then agreed to accept me.

The Court here permitted counsel for defendants to interrogate the witness, and he testified as follows:

Q. Do you happen to know that there is an American Naval Stores Company of New York; a separate and distinct company from the New Jersey Company?

A. I do not know any one except the one that I was engaged by; The American Naval Stores Company is all that I know about it.

I was engaged by a company called the American Naval Stores Company; I do not know whether it was a New Jersey Company or a New York Company. Assuming that there were two companies, a New Jersey corporation, and a New York corporation, I cannot tell you that the company which I mention as the American Naval Stores was a New Jersey corporation. I do not know whether Mr. Boardman was the treasurer of the New York American, or of the New Jersey corporation; Mr. Dill told me that he was the treasurer of the company the American Naval Stores Company, the company that employed me, and the company located in New York.

108 I was employed by that company located in New York which I knew as the American Naval Stores Company.

Q. But you are not prepared to say that you, or these gentlemen, did not represent the New York Company, the company located in New York, that had its business in New York, are you?

A. Only the company that was located in the New York office is all that I know.

Direct examination resumed:

The rosins were received from lighters, generally, and sometimes from steamers, and came from southern points, Brunswick, Jacksonville and such places. When they arrived they were numbered on the head from 1 to 14. No. 6 was out, and No. 13 was out. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 and 14. No. 1 represented B rosin, and No. 14 WW rosin. We raised without reinspection, the grades frequently after the first few weeks. We raised them most every day until I left there. There was no re-inspection; we simply took off the southern grades, say, for instance, a barrel was marked 5, number 5 on the head, and it was a selection of "G" grade, we got a scraper and we scraped off the number 5 off the head, and off the side of the barrel the G, then we got a little turpentine and a brush, dipped the brush into the can of turpentine and rubbed it gently over the barrel, and then got some pulverized rosin and threw it lightly on the barrel, and then marked it up, marked it H, a grade higher. We did thousand of barrels while we were there. We started in about a month or six weeks after I went there, and did it until the day I left there; the day I left there, we did it. Clehan was the delivery clerk and marked, and he is here. Richard Degroot was the assistant foreman; I submitted the work that I had to do to him. I would give him a list of the marks and what they were to be raised to. I got those lots or marks from the yard office, furnished by the bookkeeper. When a lighter would come, say, with a thousand barrels of rosin, the bookkeeper would send me out a list of what the lighter had, say for instance he had No. 1, 150 barrels, No. 2, 300 barrels, and so on to make up the thousand barrels. We followed the orders from the American Naval Stores Company coming from the Naval Stores in New York, to our office in Brooklyn. They were brought by a messenger boy running between our yard and the American Naval Stores Company. I did not prepare any new grade sheets after the raising of the grades. When we would receive it there sometimes we graded it up on receipt, and sometimes we would grade it in the yard without it being delivered at all. Sometimes we just got an order to grade the rosin as it came in, for instance there was a lighter had 650 barrels of rosin; they would tell me; say there were 300 barrels of M, 300 barrels of W, and 50 barrels of WW; I would get a list from the office saying brush up the M's and make them W's, brush up the W's and make them WW's.

Counsel for defendants were permitted to ask the witness certain questions to which he testified: I never received any instructions from Mr. Boardman about this grading. I cannot say that Mr. Boardman was ever a party to it in any way. I received the order on the bill-head of the American Naval Stores Company, to deliver so many barrels of rosin; but I do not personally know of any connection that Mr. Boardman had with it.

(By the Court:)

Q. This work described as being done under your supervision

in the yard, is that the place where Mr. Geo. M. Boardman put you to work?

A. Yes, sir.

By the COURT:

Q. Is that the office where you met Mr. Boardman, the office where you made reports of your business?

A. Yes, sir.

By the COURT:

Q. And where you assume these orders came from?

A. Yes, sir.

To some of the parties that we sold rosin to we raised the grades all the time. Proctor & Gamble, for instance, all the rosin that went to them we raised; and all that went to Rabbitt & Co., was raised. They were raised one grade.

Q. Was there any pretense of opening the barrels, and taking a sample for reinspection? Did you have a naval stores inspector with you, or anything of that kind, when you went to raise those grades?

A. Not at first, but afterwards something occurred, I suppose. Anyway, afterwards we opened a portion of the head of the barrel, half of the head, and spiked a little of it up, so that the inspector could see it. He did not cut it, he simply looked at it and passed on; if the rosin was all right he simply looked at it and passed on to the next. And if the next one was not up to the grade
110 of what it should have been—say, for instance, it was G rosin, suppose that the next barrel was not G rosin, he would put a dot on it with a brush he had in his hand, just a dot, and he went through, and did all. After he went out, we put the heads in, and lined them in. Those barrels that he did not do anything with we raised them a grade higher, those that he put a dot on we set them aside in the yard and did not ship them at all. The raising of grades continued five or six months before the inspector even made a pretense of inspecting. For the first five or six months no head was taken out at all, each barrel was scraped, the mark was scraped off, and another mark put on. Jerry Mahoney and Pat McGowan scraped it; Charley Sweeney marked it off with turpentine, and David Hill marked it up; they are all here.

Cross-examination:

In the yard in which I was, there were no rosins that belonged to different people that were shipped there; so far as I know it all belonged to the American Naval Stores Company. At times this yard would contain many thousands of barrels of rosin.

Q. The rosin was of varying grades when it came in, some 14 different grades?

A. 12 grades I guess. I think about 12; we had no 6 and no 13; there might have been a hundred in the trade for all I know, might be quite a number. If the rosin was inspected I furnished the labor to open the barrels, but I was not the inspector. When

the rosin got to New York there was an inspection mark on them. 7 corresponded to the letter H. If there was a lot of 3107 barrels of rosin marked with the figure 7 on the yard, I would not know whether those 3107 barrels of rosin would all grade up under the type that was used to H rosin.

Q. Suppose in 3107 barrels it was found upon regrading that there were 1046 barrels that graded I, then you say they would change the H to an I wouldn't they.

A. Yes, sir, if we got an order to do it we would do it, probably we would not do all. If I got 3,000 barrels into the yard, probably we would not grade that at all when they went in, it was only when I would receive orders for the delivery. When I received orders to grade, I would grade in accordance with the order. I is a better grade than H.

Q. Suppose in this lot of 3107 barrels that had come to us on your yard marked H, that in truth and in fact there were 1046 that really graded I, if you received an order to grade that rosin I, you would carry it out and make it I?

111 A. The 1000.

Q. The 1046?

A. How could I find that, how could I identify this thousand barrels of the 3000.

Q. Suppose now that that 1046 barrels in truth and in fact from the grade that had been made—the previous inspection had been communicated to the New York people, that they knew that 1046 barrels of that rosin graded I, and you received orders to put I on it, you would mark the I on the barrel, or cause it to be done?

A. I couldn't tell those—

Q. Don't you know that they all went there with the shipping mark on it?

A. But if there was 3000, how was I to deliver the thousand lot? We got no such shipping marks as RON; we did not have shipping marks. There was nothing on the barrels but a number and the letter; suppose it was I, the number would be 8 on the head, and the I would be on the quarter of the barrel. 7 and H mean the same thing. All I saw on the barrel was the letter and the number. If there were 3000 barrels marked 7 H, we would put the whole 3000 together in one pile. There was nothing but grade mark and number on the barrel, and the letter and the number meant the same thing. I would not know whether in that lot, say of over 3000 barrels of rosin, marked H, it would not turn out, upon inspection in accordance with the commercial types, that there were different grades of rosin in that lot; I have no means of knowing.

Q. Where [whether] or not the rosin that was marked, for instance, an I, was in truth and in fact I or not, do you [know]?

A. I knew it was a 7 and an I, that is all I knew. And I sort it according to the marks and the numbers. In regard to these companies, I have no personal knowledge of the facts except the simple statement that I went there upon the recommendation of some gentlemen as to my worth, and I saw Mr. Boardman, and I was told

he was treasurer, and they agreed upon terms with me, and I went to work.

Q. If it be true that Mess. Babbitt & Co. desired a grade of rosin for their manufacturing purposes, don't you know that we would select the rosin that would come up to the grade which our friends Babbitt wanted to make the soap with; wouldn't that be selected out of the great mass on the yard so as to make a grade that would suit our customers; wasn't that what was done?

A. No; we were told from the office that Babbitt, they had
112 sold so much of rosin to Babbitt; they had not any I on the yard, they would tell me to go out and see how many I's you got; I would come in and report probably 50 barrels of the I's I got; they wanted 250 barrels, you have got to make up. At that time we have thousands of barrels of rosin there. No inspection about that what we raised. I don't know anything about grading.

Q. Don't you know that if in grading it should be put nearer to the I than it was to the G, that it would be treated as the I rosin and not as the G rosin?

A. We didn't open the barrels at all to look at them, we did not know that it was a B rosin that was marked H. These barrels that were sent there were not unheaded frequently, those that we would re-mark, re-grade up, were not opened at all at any time. They put thousands of barrels in there and they were never inspected at all, never inspected at all going out. Suppose there were a lot of 3,000 barrels, no part of that was inspected. Sometimes there was inspected 10 per cent., but it was not usual; it was not frequent; it was sometimes, very seldom. By ten per cent. I mean 10 out of 100. Sometimes he would inspect them, but very seldom, once in a couple of months, may be. I don't know what they did down South, how many of the 150,000 barrels were inspected before we got them. At just a rough guess, possibly 20 per cent., 25 per cent. of the 150,000 barrels were really reinspected afterwards. I do not mean to say that every one of the 150,000 barrels was raised one grade higher. I have known it to happen rarely that in making up a lot so as to get uniformity of grade, a higher grade was substituted for a lower; sometimes we would not have enough, and would put in a few barrels of a higher grade to make it up.

Redirect examination.

The grades most frequently raised were from G to WW, and to WW, too. Our attentions with the paint brush were not confined to any particular grades, just according to the order that we received, what the sale was; suppose they sold H rosin, we would make it H rosin. E and F were raised, too, but not below that. No inspector at all had anything to do with the raising of grades to which I have been testifying. Oh, yes; there was some rosin reinspected; it was inspected by Mr. Smith; that did not include any of the stuff we raised. They would tell me in the office there was an order out for 250 barrels of H rosin; we would go out in the yard and look
113 around, and could not find more than 50 barrels of H rosin, and come back; they would say, you will have to make them up. The 250 was used merely as an illustration. The bar-

rels we graded up were not opened. Of the 150,000 barrels that passed through that yard under my administration, I would say 50 or 60,000 barrels approximately had the grades raised without any pretense of reinspection.

Recross-examination:

I said I estimated 25 per cent. had been reinspected, and that I had no knowledge of the actual grade of the rosin, all that I did was to obey the orders that I received. I left the service of the company in May of 1908. There was a strike. I left there because they treated me with indifference; I thought they might confide in me, being their superintendent, as to how to manage the strike; instead of that, they called in people from the outside; other warehouses, and took their instructions from them; I didn't like that and I thought I would not stay. I felt they had not treated me with deference due to the position which I held; I have no feeling towards any of them; I have always been friendly. Mr. Ketcham always treated me as a gentleman. At the time I was not consulted I had no unfriendly feelings for them; I received my money from them while I was there; I received kindness and everything else from them, but I thought that they meant to depose me at the time, and I thought I would get out before they would do it.

RICHARD DE GROOT, sworn for the Government.

Direct examination.

I know Mr. Walter O'Keefe; he was our foreman in Brooklyn in the rosin yard in 1907 and 1908. The yard commenced, I believe, in April; I went to work in May, and stopped about the time of the strike in the beginning of May. Certainly I have knowledge of the grading up of rosins on those yards without reinspection of any kind. We would get a certain lot, 600 barrels, should be delivered, and we wanted to get F rosin; we would take 600 E rosin, we would take the E off, scrape it off, damp it over with spirits and cover it up pretty well and make the F, raise it one grade, and that was done very often. That referred to any other grade; for instance, they would have H marked an I; out of M we would make an N; move it one grade higher. That was done very often; many days we
 114 done it right along, certainly. In beginning first, they didn't do it so much; they had it more by the sample; but in the latter part they done it more regular without sample from the New York sampler. M is lower than N.

Q. Did you ever grade down?

A. Oh, they would be foolish; they would not do that, would they? I could not say how many barrels passed through the yard while I was there, nor how many barrels were graded up. Sometimes there would be 20 or 30 men working; we hired them every morning; there are three or four witnesses here that done the scraping. I was looking out that the right lots were delivered. In selecting the lot to grade up, Mr. O'Keefe had orders, he would say he wanted 600 H rosin, give me them 600 H's, and he says scrape them and make

an I out of them; they would have to go for I. I seen Mr. O'Keefe there when this was being done; I see Mr. Ketchum was there, too; he went through the yards there every day, almost, morning and night time. I seen Mr. Dill several times in the yard, but I do not recall that he was ever there on any of these occasions. He come around there a couple of times between 7 and 8 before he went to the New York office.

Q. What office?

A. Didn't they have an office over in New York? I thought they had an office over in New York. Mr. Dill would talk with Mr. O'Keefe.

Cross-examination:

I did not take quite an active part in that strike; I did not do any more than anybody else; I left there, and that was all. When a man gets cut down in his pay he has to strike, unless he wants to work for it. I did not insist upon the other men striking, but I induced other men to go to work and keep at work. I advised, "Boys, let's go to work," and we worked for five days longer, through Thursday, and then I went out with the rest of them. I worked there every day, and saw these grades raised; no doubt about it, saw them all.

Q. Never see any instance where they would give a better grade? That, you say, would be foolish; they never did that at all?

A. Certainly, of course, they give a better grade; if I mark out the I, and take the I off, and make it K, to make a better grade, you can sell it for a higher price, 70 or 80 cents a barrel more.

Q. They never did the reverse of that at all?

115 A. They did it often; I am absolutely certain they never would lower the grade. I know that in a lot of 3,000 barrels of rosin, there would be different grades; I got a list of that coming in the steamer's cargo along with it. On those barrels there would always be a shipping mark; there was a 4; 4 stood for E, 7 stood for H, 8 for I, etc. We ain't got no 6, because the 6 and 9 are too much alike. We got 300 4's, or 200 5's, and that is the way my list called for, and I took the stuff away; I would be doing that kind of work. There would be nothing on the barrel to show whether it came from Jacksonville or Savannah; nothing to show where it came from, only what they call the still mark sometime was on it. It may have had Wade on it; of course, maybe 15 or 20 or 100 barrels he put Wade on it, just as a matter of form, the still mark. I do not call that the shipping mark; the shipping mark was the 4 and 5. Wade was just a still mark; a man that had been on the railroad did something like that; that was all the marks on the barrel, just the Wade mark; he was the manufacturer. When a lot of rosin came on the yard, there would be a letter, for instance, H, and that would correspond to the figure 7. When I took the H off I had to take the 7 off, too, else it would be a dead give away. The 7 was on the bottom on the solid head, and the selection is on the side over the weight or under the weight. When I left there there was rosin left on the yard. Sometimes they went along and sampled so many; sometimes they sampled a small lot, and other times they

let it go; sometimes they would sample it, and sometimes they would not. I have seen many barrels with their heads out for sampling; in the beginning they sampled everything that come in, but in the latter end they didn't sample at all; there wasn't any use for a sample any more.

Q. They would sample when it first came in, and afterwards they would not resample?

A. They sampled, the I's would come in, I say now understand properly, we got I's, they were sampled, and if the sample, of course, made them a grade higher, they were put away then by themselves. I knew Mr. Smith, the inspector who did the sampling, and saw him inspect there from time to time. In the beginning I saw a good many of these barrels with the heads open, heads taken off, for the purpose of getting the samples out. During the latter part of it they didn't do so much sampling; they did some, but very little. I know that one of the customs of the trade is to take, say, 10 per cent. of the rosin and sample that, but that is done more with common rosin, you know they take more common rosin that comes from

116 Wilmington and Georgetown, that is sold by ten per cent.; if I got 40 per cent., I get 40 per cent. E and 60 per cent. F, and sold that way. By ten per cent. I mean that if there were 100 barrels of E rosin we would examine, say, ten barrels, and take that sample for the ten; and they do it often, too, for satisfaction. I have only seen the mark Volga on the solid head on some of it, and Yanko. Trino. 7 H. Those marks, like Volga and Yanko, would be on the bottom of the barrel. The Volga was also a shipping mark; certainly, they had to go by that, I suppose, but it had Volga besides the selection M on it; Volga stood for M, and Nina stood for N; Yanko was for WG, Santee was WW. On the head it had a number, so that if the selection was washed off we would know what the barrel would contain, and on the side a letter.

Q. And then on the bottom some word like Wade or Yanko?

A. That was only a still mark on some of the barrels, you know; not on every one of them.

Q. Or Volga?

A. Not on every barrel. There was not generally on the bottom of the barrel, or on some other part of the barrel, some letter or word besides the number on the top and the letter on the side; near the bottom was only just No. 7, stood for H, just a diamond 7, that stood for H, but on the loose head, like I suppose the man that manufactured it one way or another, he put his own name on it; might put T. H. & Co. on it, something like that, to indicate that it belonged to that man. That is not what I call a shipping mark; I suppose they call it shipping mark down South; we only went by the numbers on the bottom. When we went out on this strike there was quite a large number of barrels on the wharf which had not been reheaded. There may have been, of course, a number of barrels of rosin on the yard with their heads out when we left there, when we quit, some of them didn't line in yet; maybe a few were sampled there what was not lined in, because the coopers and everybody they had to work, you know, because we couldn't hire men

for 20 cents; and there may have been some of them left open; the work was left open. I couldn't swear that at the time we struck and left there there was a number of barrels of rosin with the heads left out; I don't know whether there was any or not; there may have been; I said before, but I can't swear very positive, I am under oath, and won't swear positive that there was or not; there may have been.

Q. You have frequently seen them there on the yard with their heads out?

117 A. There may have been, I say, because I cannot swear; I am under oath; I cannot tell for sure, because when we went on strike there was some left or not; I can't tell very positive.

Q. At the time before you left didn't you see barrels—

A. Yes, there were 100 or two on the dock, maybe because they wanted to be sure of it if they could raise that higher, they wanted to find out really whether the stuff was better.

Redirect examination:

These marks, Wade or T. H. & Co., were only on a few of them; they were just a still mark, like a stillman would send them. Taking the run of the barrels as we came to them, they had on the solid head, when we got 600 barrels now there were 300 barrels that came, 300 barrels No. 3 and 300 barrels marked No. 4; I had to separate them according to that; there were 300 barrels diamond 3 and 300 barrels diamond 4, and I separated them according to the numbers, and they turned out to be E and F selection; 3 was the E, and F 4; that is what we went by, that little number on the bottom. Some of them had no diamond, but most of them had a diamond 4.

Q. What else would that barrel have on it?

A. Other than it was F selection and 4, 4 is the F, you know. There was no other mark on the barrel, on some of the barrels I said sometime there was on the loose head a still mark or something like that; on some of the lots they were marked Yanko and Yanko stood for WG. We would get 100 lot or 200 lot marked Yankos, or a 90 lot marked Trinos, etc.; that was the distinction, instead of having the number, they would have Yanko and Trino and them marks instead of having the number. Those that had the Yanko and such marks on it had no number on it. Very little of it had these marks on it and not numbered; we didn't get much of that stuff. With reference to the strike, I advised the men to go back to work, but they didn't go. If we got an order for a thousand H's, for instance, and didn't have that, and they had plenty of G's on hand, they would take out the G and make H out of them. We scraped the number off, we scraped the selection off. Then, of course, we put the mark on destination, where it was shipped to, Auckland, New Zealand, or Sidney, New South Wales, or wherever it was shipped to, we marked that right over: we had a brand, you know, a large brand, and, of course, couldn't see nothing of that lot 4 scraped off.

118 JOHN CLEHAN, sworn for the Government.

Direct examination :

I know Mr. O'Keefe, and was at work with him on these Brooklyn naval stores yards, working in the position of delivery clerk and assistant to him; when he was not there I was in full charge. I delivered pretty near all the rosin that went out of the place. They presented me with the order, and I made the delivery, and I brought the order back to the office, and after the day's return they would put the orders in an envelope and send them by a messenger, a young man in the employ of the National Transportation & Terminal Co., to New York. He afterwards told me he became Mr. Dill's office boy in the New York office of the American Naval Stores Company. He was messenger from National Transportation & Terminal Company in Brooklyn to the American Naval Stores Company in New York. Mr. Smith made inspections of rosin in that yard, but I could not tell you at what time, under lots that would be called for; some lots we didn't make any inspection on at all. We raised the lots that we didn't make any inspection on a grade higher. All grades were raised, whatever the order called to be raised, we raised them. If we had an order to read deliver WG straight, WG we would deliver it; otherwise, if we had an order, say, reading 1500 or 1000 barrels ex such and such a vessel, and the date, and down below a parenthesis WG, that meant for us to take the selection off and make WG out of it. I went there on the 22nd day of April, 1907, and remained until about the middle of May, 1908, and this raising of grades continued from about a month after I went there until I left. I could not give you an approximate idea of what percentage of this rosin was raised without reinspection; it was done so often I could not keep any track of it. I know Mr. Dill I couldn't say whether the work was going on while he was there, but I have seen him on the premises. He was with Mr. Percy Ketchum. Mr. O'Keefe engaged my services. In raising those grades we would roll the barrel out as far as the door; there was a man standing there with a scraper; he would erase the grade that that showed; there would be another man standing there who would have a brush and a can of turpentine; he would dip the brush in the turpentine, go over where the selection was erased, and get a handful of dry rosin and shake it over where the grade had been erased. Mr. O'Keefe received the rosin when it came into the yard, and he got the grading orders as it came in. Pretty near all the men did the scraping and the sprinkling and the marking. I did the marking when we didn't have any man present that they didn't know; if I wasn't doing anything at the time I might just pick the brush up and do some of it myself; if I was doing any other work, I didn't touch it. Taking the rank and file of the barrels as they came in, they were numbered according to the grade on the head and on the side the grade marks, but no other marks.

Cross-examination :

The weight also appeared; there was never on any of these lots of rosin the name, for instance, Wade, or Smith, or Brown, that I

took notice of; I couldn't see anything of that kind. There was no reason why I would not have seen such matters if they had been there. All grades were raised from time to time. I might be mistaken in that as to No. 1, or B rosin, black rosin, we call it. It might have been touched, but never has been to my knowledge. I don't recollect that; I think it was too low to raise that. WW was not raised; all but WW and B were raised; you could not make anything higher out of WW. It is therefore not correct that all grades were raised. I knew nothing at all about the real grade of this rosin; all I knew was that if they sold a lot of rosin for delivery and I received an order that the rosin should be graded in accordance with the order, and I, of course, carried out that order. I was not an inspector, and had no knowledge of the different grades of rosin. Some of that rosin was reinspected on the yard. It is also true that when I left there there was a number of barrels of this rosin with the heads open. I knew Mr. Smith, the inspector, and saw him there inspecting. Sometimes in filling an order, to get uniformity of grade, we never put in a grade higher than the one called for; never was done to my knowledge; I never done any of it, and never saw any of it done. K is higher grade than I. I have never known that if we were two or three barrels short on an order for 250 I, a higher grade was added to it so as to make up the 250 barrels; that never was done. I left there two days after the strike, but that was not the reason for my leaving. I know the witness, Mr. De Groot; he went out with the strikers.

120 JERRY MAHONEY, sworn for the Government.

Direct examination:

I know Mr. Walter O'Keefe and worked with him in 1907 and 1908. I started with them after the yard opened, in the summer, and stayed up until the strike, in July of the next year. I scraped the grade off of some rosin; I didn't put nothing back on it, somebody else did that. David Hill, Pat McGowan and I were there doing that; they are here in town. Richard De Groot was on the yard, and John Clehan was around, too. I couldn't exactly say how much of that I did. I could not say what the other man put on after I took it off. I was there at work on the yard when I was subpoenaed, and right there when I came to Court.

Cross-examination:

In looking at those barrels you would see a letter, for instance, H, on the side, a number on the heads, too, and I have seen on the barrel such words or marks as shipping marks, as the word Wade or Volga or Yanko, words of that kind, which were known as shipping marks. Quite a quantity of that rosin was inspected from time to time by Mr. Smith. Frequently the heads were out of the barrels. I used to open them. First off anybody could go right through there; there was no fence around it at all; I do not know about concealment as to what was done. If there were 100 barrels of one lot, I would open about ten per cent. for inspection; 10 barrels, 15 sometimes. We would open them all sometimes if it was called for.

R. G. TUNNO, sworn for the Government.

Direct examination:

I live in Savannah, Ga., and am local representative of the Barnes & Jesup Co., naval stores factors, and also a member of the Savannah Board of Trade. I am familiar with the grade marks in use in the naval stores industry for rosin. The letters on the blackboard shown me represent the different grades of rosin. B, the bottom, is the lowest grade, and WW, water white, is the highest. The figures opposite WW and WG are the closing quotations on those two days, December 21, 1907, and February 18, 1908. The \$6.25 for 121 WW on December 21, 1907, means there was a sufficient quantity of WW sold in Savannah on the Savannah Board of Trade to make that quotation on that day. The same is true as to WG with the change of value. The difference between \$3.50 for grade I and \$4.50 for grade K is one dollar per 280 pounds, for every 280 pounds there is a difference in price or value of one dollar, and the spread between the grades is represented by that price. The difference would be approximately \$2 per round barrel, \$1.00 per 280 pounds. If a thousand or ten thousand barrels of rosin had been raised from I to K on that day, its ostensible value would have enhanced approximately \$2 a round barrel, which would be \$1.00 per 280 pounds. On February 18, 1908, the spread between the grades I and K appears to have been \$1.30 per 280 pounds. The market for spirits of turpentine on December 21, 1907, was 41¾ cents per gallon, and on February 18, 1908, 46½ cents per gallon. That correctly reflects the closing markets at this point on those days. These figures represent the quotation on the Savannah Board of Trade on the day following the sales. Those sales were made on the preceding day; that is the quotation for the 21st of December and 18th of February, they are posted upon the sales of the preceding day, posted at 11 o'clock.

Cross-examination:

I was asked by Col. Toomer to select the dates of December 21st and February 18th. My experience in the naval stores business is that the difference between the grades I and K has almost always been marked (the difference between M and K on February 18th being 40 cents, and between M and N, 35 cents). I do not think that it was due to the fact that there was an over supply of the low grades; I do not know that to be the reason. I do not see why a short supply of the pale rosins at that time should affect the spread between I and K. Without the records before me, I would not be able to say when the spread between I and K started; there was always a difference, of course, but it has run a great part of the time around a dollar, from a dollar to over a dollar and fifty cents; forty cents, along there. As far as my recollection goes, I think that the difference in those grades runs about 75 to a dollar right steadily most of the time. It is not true that the short supply of pales in this market actuated that, and naturally would compel the spread between those two grades of K and I. I don't think, in fact, I feel quite confident, that the differ-

122 ence, the real difference, in the two grades does not warrant that difference in price; the grades are quite similar in appearance and, I understand, in uses, and I do not think a scarcity of K rosin would run it up a dollar per 280 above I. It generally runs a dollar between those two grades. I do not think that the cause of this difference between the low rosin and the pale rosin was due to an over supply of the low grades as compared with the short supply of the pales; as I stated before, I do not think the difference in the grades warrants the difference in the price. The question of the quantity of the two grades in the market would not have a tendency to produce that much result; nor would a scarcity of the two in the market have a tendency to separate the price. At that time the Standard Oil Company bought spirits, not rosins. The Patterson Export Co. were buyers, the Naval Stores Export Co. bought when it was in existence, other concerns like Mr. Farie bought here, and quite a number of others; there were eight or ten other concerns buying, and the Naval Stores Export Co. had an office or buyer here. The house I represent now are factors, they sell here, do not buy. The head office of the Patterson Export Co. was Jacksonville, and they bought here, I representing it at one time, and I represented the Naval Stores Export Co. for a very short time. At the time I represented the Patterson Company, Mr. E. C. Patterson was the head of it; and at the time I represented the Naval Stores Co., Mr. Coachman was the head of it, that being the same company of which Mr. Toomer was afterwards the president. Those gentlemen were buying on this market between those dates; there have been probably six or seven buyers on the market buying at different times.

Redirect examination:

My opinion has always been that the spread between the grades of I and K has been arbitrarily made, that it was not a question of difference in grade. The Naval Stores Company was on this market in 1905; I hear its name now, but I do not know of its appearing in the market. The Patterson Export Co. is not in existence.

Recross-examination:

The Barnes Jesup Co. is still in existence, doing business as factors; it is a corporation, of which Mr. Barnes is president; I don't think Mr. Jesup has any office with the company. Mr. 123 Toomer is not a director or interested, that I know of; I understand that he is still president of the Naval Stores Co. Broadly stated, during all this period of time these naval stores were subject to competition in this market from the various buyers I have named.

Redirect examination:

The bulk of the stuff was bought by one concern, and always has been, the American Naval Stores Company.

Recross-examination :

The larger part, the majority of the naval stores in this market, was bought by the American Company. From my knowledge of their purchases, I should say that every year they have bought for the last five or six years, four or five years, they have bought, say, from 70 to 80 per cent. of the receipts of the city. The American Naval Stores Company commenced business shortly after the last trial, about two years ago. Inadvertently I said probably the American Naval Stores Co. did for the last five or six years, but before that came into existence, its predecessors. I say then the American in the past two years. If my recollection serves me correctly, for the business year of 1908, the American bought more than 24 per cent. of the spirits in this market. I have not any positive knowledge or statistics on the subject.

THOMAS PURSE, sworn for the Government :

Direct examination :

I am now, and have been for a little over two years, superintendent and secretary of the Savannah Board of Trade. The annual report of that organization which I hold shows the receipts of spirits of turpentine and rosin at the port of Savannah for 1908, as follows :

	Barrels turpentine.	Barrels rosin.
January	8,392	15,161
February	14,815	38,361
March	5,767	32,321

The pamphlet shown me contains a copy of the rules of the Savannah Board of Trade in reference to the inspection of rosin and the gauging of spirits, the rules having been adopted April 9, 1907, and continuously in force since.

124 Cross-examination :

The figures given are made up by me from reports made to me daily by the various railroads entering the city of their receipts, and their correctness depends upon such reports. The figures include receipts by river steamers. The Board of Trade is simply an ordinary trade board. Two, three or four times a year we take an account and ascertain the amount as claimed to have been received by the railroads according to my books, and find out at a given time how much rosin a railroad has on hand, because they report to us any shipment they make during the week by cars; also they report if any packing has been used; that is, the turpentine barrels come in, and they have to be packed, and they have to give an order for that just the same. The railroads keep a complete record of all barrels used. Receipts here go also by rail to the interior, and the railroads report that on each Saturday. There is stuff that is shipped from interior points to other points that does not come to Savannah, and of that I

have no record. All I can tell is what comes to Savannah. The only reason I could give why the receipts coming by railroad to Savannah is that it is a better port for export than any other port around here. I think the fact that we send out from here combination cargoes, made up of lumber and naval stores, has a great deal to do with it, because in case of that kind, if you want to make a small shipment, say, to various points from a port, you can make it in a mixed cargo, but from other points they would have to ship to New York, and from New York to those points. It is also true that there is a right good number of buyers of naval stores in this market; and the great water and shipping facilities here make this port a desirable one from which to make these shipments.

Redirect examination:

In addition to the fact that the transportation lines report to me their arrivals and departures of naval stores, I take action three or four times a year to check against them by taking an inventory of the stock on hand. Our public Board of Trade has found our records approximately accurate and correct, and I think they are relied on by the trade. The term "packing" as used by me is where you take a barrel from which you want to get the contents into another barrel. We would call that barrel a packing barrel; it was used for that purpose, for repacking another barrel; *it was used for that purpose, for repacking another barrel*; that is where it gets its name, because the contents of that barrel are used to pack
 125 another barrel. The superior facilities of the port of Savannah are very superior, and so recognized in the trade. I think all export people recognize Savannah's very superior advantages over almost any of the Southern ports. Our naval stores terminals here are public, owned by the railroads, and the service is very satisfactory and public. I do not know that I could say positively that is an inducement towards the shipment to this port of naval stores. The fees of the supervising inspector are fixed upon the receipts and departures, and that is a further check upon the accuracy of the statistics reported. I commit myself to the statement that these statistics are correct, and that the facilities of this port are exceptionally good.

Recross-examination:

I do not assert that the report of the number of barrels is absolutely correct, but it is very close as estimated, so that it is not enough to count. For instance, the count may average out two or three hundred barrels, something like that sometimes. I could not say what has been the greatest variance since I have been secretary.

Q. The receipts for a given month depend upon the season of the year, the demand, the conditions of weather, so that the receipts of one month, or a part of a month, may vary very much from the amount of the receipts of another month?

A. O, the weather has a great deal to do with the crop. If the prices were to the interest of the operator, higher prices, he would naturally ship in to get advantage of them.

The Government offered in evidence following rules of the Savannah Board of Trade: No. 8, as to spirits of turpentine, and Nos. 1, 2 and 3, as to rosin. They are as follows:

M. A. BROWN recalled for the Government.

Direct examination:

During the months of January, February and March, 1908, at the ports of Jacksonville, Fernandina and Tampa, the receipts of spirits of turpentine were 15,805 casks, and 82,126 barrels of rosin.

126 J. R. PARKER, sworn for the Government.

Direct examination:

I am inspector of naval stores at Jacksonville, and have been in that capacity at that place for the last ten years. I was inspector there until July, 1893; then I was appointed by the Governor, Supervising Inspector for the State for a term of four years, and that expired July 15, 1907. Last year I was inspector for the Consolidated and for the Barnes & Jesup Company. I hold that position now. That is, inspector for the Consolidated Naval Stores Company and the Barnes & Jesup Company. In my trade it is necessary to have a good acquaintance with the work in general, gauging and grading, and with the grading of rosin. You must have the knowledge to know how to grade a barrel correctly with the gauge rod, which is used for the purpose of getting at the contents of a barrel of spirits, or any other liquid, so far as that is concerned. Then you must be acquainted with the grades of the rosin. There are fourteen different grades and we have a type, a standard type, to go by. We match this type against a sample which is cut from each barrel. That is the work of an expert. The first thing, the rosin is weighed and set in double rows, with the weight marked on it. Then we have spikers, who have a spike to take the head out with, and spike lumps out of each barrel to a depth of six inches; out of the top and ten per cent. of the bottoms. Then the cutter, who cuts the samples, comes behind and cuts the samples from the barrels $\frac{7}{8}$ th of an inch square and puts it on the barrel. Then the inspector samples up and calls the grade and marks it on the barrel. The sole distinction between the grades is the difference in color, except that sometimes we allow for dirty rosin. I would not like to undertake to grade a barrel of rosin at night; I do not see how it could be done properly. Hiram Smith & Son, New York, furnish the standard type, and Geo. L. Hammond, they are the inspectors, and they are furnished by Fielding, Nemeyer and Wassels. Age and exposure to sunshine have a tendency to bleach the types out and make them lighter, show a better grade. The length of time that a set of type is used depends on the exposure and the constant use of it. The lighter grades will not last as long as the darker ones; they fade quicker and give out quicker. About two or three weeks is long enough to use a sample. If the standard types are used for, say, three, four, six or nine months, it would make a difference of grade, I should say, in the

light colors, pale rosin, which would be against the interest of the producer. In some cases, cutting the sample an eighth of an inch larger would make a difference of grading and in others it would not. You take fine rosin that is close on the "N" type, just even "N" with a seven-eighths size, and then you cut a sample an eighth of an inch larger, it would grade "M"; it would not be anywhere near "N." It would grade down. Then, if you take a sample just between the two and the type or the sample is a little bit too large, it would not bring it down, because it would be "M" anyhow, that is not "N"; if it does not go up, it goes down. A barrel of turpentine is gauged with the gauging rod. We have a hook with the mark opposite the gauges on the rod. You hook the hook in the center of the barrel, about the bottom chime, and the mark on the hook opposite the figures on the rod will show you the basis to start on. Then you reverse your rod and take the other end, add the two together and divide it by two, or halve it, then you have got the contents of the barrel; that is, what the barrel will hold, not what is in it. By the chime of the barrel, I mean the inside where the head comes up to the staves. This is the head of the barrel and the staves are here. You put your rod down diagonally to the bottom, and then in the other direction the same way, you add together and divide by two. There is a standard gauge rod made by Belcher Brothers of New York in use by the inspectors. If the point of the gauging rod has worn thinner, you could get a lighter or more accurate gauge with that than with one that had not been used so long. The thin point will gauge a little more. Turpentine will rise and fall with the thermometer. If you buy turpentine on a basis of 60 degrees, on which it is generally bought, and fill the barrel, when the temperature goes up twenty degrees, you can get a quart or more out of that same barrel. The weight remains the same but the volume changes. The weight is there, but you have got more gallons. By packing a barrel, I mean it must be a gallon out. It must lack a gallon of being full. Packing a barrel is taking a gallon out of it if it is full. If you ship a lot of barrels that are not full, that is, not up to the gallon out, you pack it to the gallon out and charge it as packing, or deduct it from the next as packing.

Cross-examination:

I was inspector for the Florida Naval Stores & Commission Company first, then I was inspector for the Consolidated Naval Stores Company, which is a factorage Company, of which Mr. Coachman is president. Mr. Barnes is president of the Barnes & Jesup Company. I think D. B. Rogers was the president of the Florida Naval Stores Company. I did not inspect for the Naval Stores Export Company. They were exporters; they were buyers, and no inspection, that I know of, is done for the buyer. There are inspectors there who work for the buyers and gauge sometimes. I am inspector now for the Consolidated and for the Barnes & Jesup. The types for grading rosin are sold in the market so that anybody can buy them. A man of ordinary intelligence with a piece of rosin before him and the type can compare the two to-

gether, but not accurately. He can compare them; I was going to say he could compare them, but if he wanted to grade the rosin, he could not do it as accurately as a man of experience. The result of the grading is dependent upon the observation that a man makes and his experience in doing this work. If you were to take ten inspectors and put them over one hundred barrels, possibly two or more of the inspectors would differ as to grades. The American Naval Stores Company has no inspection and grading in Jacksonville that I am aware of. They have a turpentine inspector there. Rosin is done by the State inspector. The appearance of the rosin is not a bit affected by the light to which the rosin is exposed. For the purpose that you want it, if you want to grade it, you can grade it just as well on a cloudy day as on a bright day. So far as the grading is concerned, the result is the same, no matter what the difference in light is. That is my idea about it. Sometimes a barrel may have more than it ought to contain and then the excess is taken out. There is allowance of one gallon to be taken out of the barrel. If a barrel were to contain fifty gallons and it gauged fifty gallons, one gallon would be taken out. The effect of heat on turpentine is to cause it to expand. I know the inspectors at Jacksonville. I do not think there are any who become so expert he can grade rosin without having the type before him. I know one or two that could come pretty near to it, but they refer to types anyway, but not in every instance. They do not put every sample by the side of the type. Mr. Register is an inspector there and I know him quite well. It is nothing unusual for him to take up a sample of rosin and grade it without reference to the type.

Q. If a gentleman of experience can grade the rosin without referring to the type, a man with the type before him, like you are comparing with the color on that, it does not take much skill to determine the color, does it, with the type before him?

A. There are so few of them that are right on the mark, 129 so many of them that are between grades, that you have to use your judgment as to whether it is a grade or not. You have to use your judgment when they are between. You know, of course, you take the type, the sample with the type, and there are some people who have got the acute sense of telling the difference; a sort of color blind, it may be. We never get in a hurry when we are grading; we cannot afford to.

Q. And the consequence is, it narrows all down, that when the sample taken is to be graded, for instance "I" or "H," is largely a matter of the good judgment of the man who is doing the grading?

A. And the man's experience; his experience will tell him which to do. When these types are used, they are used in the light, necessarily, and eventually that will have the effect of making the type a lighter color. In the pale grades it lightens up after two or three or a few weeks. The pale rosins are the more valuable. They range from about "I" up to "WW." On that class of rosins, which are the most valuable rosins, known as pale rosins, the exposure of the type to the light has the effect of making those types lighter in color, so that in a few weeks you have got to throw aside your types and

get new ones. That is done because, the types having been used for a few weeks, do not truly represent the standards. I was on the yard of the Naval Stores Company in Jacksonville pretty near every day when I was in town, not all the time. As far as I know, delivery from that yard were all promptly made. I never saw at that place, or at any time, any change of grades of rosin made by the American Company. Everything was fair and orderly so far as it could be made to appear.

Redirect examination :

I did not see any rosin that looked like it had been changed by anybody. I should say the types would bleach more rapidly than the rosin in the barrel if the heads were taken off because the types are a smaller body. There are one or two inspectors that I know that can come pretty near grading without the type, but they do not attempt to do so, they are not allowed to do so. They are experts in grading and can come pretty near telling what the grade is. Any grade, as soon as they throw it up to the light, but they are required to have types, the law requires them to have. There are one or two such inspectors. Mr. M. C. Register, who used to be an inspector here and in Jacksonville, he is about the only one that I can recall right now. I have explained that when a barrel
130 gauged fifty gallons when it was full the trade custom was to remove one gallon. There is no trade requirements or necessity at all that I know of for taking more than that. A cloudy day does not affect either the type or the rosin. You can grade better on the northern light, that is, it is easier to grade with a northern exposure than with any other, than it is facing the sun.

N. V. GRAVES, sworn for the Government.

Direct examination :

I live in Philadelphia and am in the varnish, japan and color making business. In the conduct of our business, we use both turpentine and rosin, approximately, some five to ten thousand barrels, I should say, per annum. Our plants are located at Philadelphia, Pa., and Camden, N. J. Our purchases of turpentine are made on the basis of the Savannah market, I presume. We buy considerable stock in Philadelphia from Savannah, based on the Savannah market. We made a good many purchases during the months of September, October and November, 1907, from the American Naval Stores Company through its Philadelphia office, of which Mr. Fletcher is manager. I cannot give you the prices of any of those purchases. I came here in answer to the subpoena and I am unprepared with certain data, but I know that we are buying daily from the American Naval Stores Company. The price of the purchases was based upon the Savannah price, with freight charges added the f. o. b. Savannah charges, with freight charges added. with respect to tentative offers, Mr. Fletcher, of the Philadelphia office, has frequently offered us rosin, particularly specifying the quality and giving the price, and then when the offer would be ac-

cepted he has stated to us he could not deliver or he has minimized the quantity. Mr. Fletcher is the representative in Philadelphia of the American Naval Stores Company, the only party whom we have ever seen in connection with them.

Cross-examination:

I do not think our purchases of rosin would exceed over fifty barrels per week. We usually buy from one hundred to three hundred. Of course, you understand, that is out of my department; I am president of the company.

Q. A tentative offer is an offer that they will agree to sell
131 you, if at the time the offer is accepted, they have then on hand the goods in the quantity and quality that has been offered. In other words, a tentative offer is the very reverse of a firm offer?

A. It has so frequently occurred, if we did not carry a very large stock, our business would be stopped.

I am, of course, aware that rosins vary in grade. We would be offered a particular grade and at a certain price.

Q. And a tentative offer means that if before that grade has been sold or disposed of, you accept it, then they are to sell it, but if it should be disposed of, of [or] if at the time you signify your acceptance of it, they did not then have it on hand, they would not be compelled, of course, to comply with the mere tentative offer?

A. Could not be compelled, that would be the unfortunate part of it. I understood perfectly well that if at the time I signified my acceptance they had it in that quantity and that grade it would be delivered. If they did not have it at that time, in that quantity and in that grade, they would not be compelled to deliver it on a tentative offer. In the matter of trade, the American Naval Stores Company had no competitors for our business equal to our requirements. We have been unable to buy elsewhere than from the American for two years. Frequently we have been offered by the Patterson Export Company, and before we could make the purchase the American's price would advance so that when we went back to them we had to pay a higher price than if we had bought from them in the first instance.

Q. A price would be offered to you, for instance, by the Patterson Export Company. Before you could accept the price there would be an advance in the market, and then in order for you to get your goods, you would again have to yield to the American?

A. No, sir; I do not think that. We got a price, for instance, I want to make myself plain, from the American Naval Stores Company on turpentine and rosin, we got a price from Mr. Jackson, who is the representative of the Patterson Export Company, on the same articles. Now, say Mr. Patterson's price is lower, we place our order on Monday and Thursday by understanding with each one of them. We have until five o'clock with each one of them. We endeavor to buy from the lower party; the lower party claims that they have not the goods on hand. We go back to the higher party, which, in this instance I have in mind, is the American Naval Stores Com-

pany, and they in the meantime raise the price and we are
132 left out altogether. I never considered the Patterson Export Company a competitor in business of the American because they could not deliver the goods. Our experience justifies us in believing that pending the inquiries being made by us, the available stock at the lower figure was bought up by the American Naval Stores Company, and we were left in the lurch. My idea is that they went and bought stock at a low figure, or at a good figure, and then offered it to me at a higher figure, and having the stock then on hand and I wanting it, I bought it from them at the higher figure because I could get it no where else. We paid for what we bought from them before we see it. We have gone on dealing with them and are dealing with them today. We have had some serious controversies with Mr. Fletcher, when notably on one occasion with reference to the price which he charged us for rosin. He gave us price which did not represent the f. o. b. price here, plus 35¢ freight, being something like sixty cents per 280 pounds in excess of that price. That represented something which we never could find out, which led to a serious controversy, which was something of this order: I told him that the legitimate price of turpentine was simply f. o. b. price here plus the freight charges, and the other price was an illegitimate price, which led to some words, which infringed the moral code a little bit. I do not care to go into that. I do not think there should be but one opinion on a question of that kind, as merchant. The American Naval Stores Company did not concede my view of it; they made me accede to their view of it, which I did. There was not another opinion, there was another authority. I paid the price which they insisted upon, very gracefully. I continued business relations with them right along by virtue of necessity, and am now engaged with them in transactions every day. With my narrow range of vision; which is comprehended by what I tell you here, I could not come to any other conclusion than that the Patterson Export Company and the American Naval Stores Company were somewhat in collusion against me. From my standpoint, that was my idea about it.

Redirect examination:

I do not think the Patterson Export Company is now in existence. So far as I know, they are not in competition with anybody any more.

Q. What do you mean? You said with the narrow range of your vision on that transaction it would appear so?

A. I would like to explain that. I mean that in this particular transaction which I have recited here, where the
133 American gave us a price and the Patterson Export Company gave us a price, the latter being the lower price, and that having until five o'clock in the afternoon to place our order when at about four we endeavored to place our order, the Patterson Export Company claimed that they had no goods to deliver, that they had been sold. We then went back to our only other alternative or bidder, the American Naval Stores Company, and they

raised the price on us. By narrow vision, by the use of the term "my narrow vision," I mean my comprehending of that one transaction. It seemed to me that there was somebody in the office of the Patterson Export Company, and I so told them, who had probably sold out their supplies to the American Naval Stores Company, knowing that we would have to go back to the American Naval Stores Company, and you could imagine how one with any commercial spirit at all would rebel when we went back and found that we had to pay a higher price because we tried to get a lower price—that is my "narrow vision."

Recross-examination:

Only momentarily did I have any feelings against the Patterson people because they did not comply with their bid.

W. R. POST, sworn for the Government.

Direct examination:

I reside in Detroit, Michigan, and am a manufacturer of soap. I was engaged in the same business for the year beginning April 1, 1907, to April 1, 1908. The name of my plant is the Detroit Soap Company. Rosin is an important raw material in our business. We buy the grades "H" and "K," "I," "M," a variety of grades according to the color of the soap. Our contract during that period was with the American Naval Stores Company. I think our contract was with Savannah branch, though our shipments, I think, came from Cincinnati. I think the great majority came from Cincinnati. From the weight certificates we got their yards were at Ludlow, Ky. The bills came from Cincinnati, I think. It is possible that some came from Savannah; I would not say that all came, but the majority came from Cincinnati. The contract which I hand you, as

134 I remember, was made in January, 1907, but the deliveries started in July, 1907, and ran until January 1, 1909. That was the delivery of the grades of rosin which we might require in our business. We do not buy any turpentine. As I remember, our contract ran not to exceed approximately 6,000 barrels of rosin per annum and that we were not to take over 900, I think it was, at any one thirty days. We were limited to the quantity we could take. Our orders were usually by telegraph. At the start of the contract, I think they were sent to the American Naval Stores Company of Savannah; afterwards it was shifted at some time during the period to the American Naval Stores Company of Cincinnati. Deliveries were very fairly prompt. Almost invariably the part of the staves on which the letters were placed giving the grade was on a newly scraped portion of the stave. It was bright compared to the balance of the stave. Looked like it had been drawn off with a draw shave or hatchet, or something, and put down with a stencil on the bright portion of the wood. We were very negligent in reinspecting this rosin. We usually had about enough rosin coming in all the while to meet our requirements and we accepted their grading. I am not an inspector. I have done it on my

own account, but am not an expert. I can only say that I inspected a certain car with a box of type; I think it was a car of I rosin, as I remember, and according to my inspection, which was not as an expert, it graded a very poor H, according to the type I had. I could not swear that the type was right. I am not an expert in any way. The evidences of the scraping off were almost invariable; I do not remember seeing a barrel that was not treated in that way. The price to us was based on the Savannah market, on the day the order was received by the seller. I think the contract covered a year and a half. We telegraphed for rosin to-day, three or four hundred barrels of rosin. The price was based on the closing market in Savannah for to-day.

Counsel for the Government tendered in evidence the contract testified to by the witness.

Cross-examination:

The idea in the manufacture of soap is to get a uniformity of grade of rosin, as much as possible. We order a certain grade for that purpose, and we want that grade when we order it. On those barrels there were occasionally besides the letter firm names or something, and on the end of the barrel there was always a shipping mark, for instance, a name like R. E. Wynn, our shipping mark, and occasionally there were a few hieroglyphics, you wouldn't
135 know what they were. I should say that occasionally there were other marks on the barrels besides the grade. This new surface almost on every barrel was apparent. Those types I used did not belong to us; I got them from another firm that was buying rosin, they said they were O. K., and they had them in a dark place. I know nothing about the types, how old they were. I am sufficiently familiar with types to know that in the course of a short time they will bleach. During the life of our contract I should say we received around 400 barrels a month from the American Naval Stores Company, about 9000 barrels would represent the aggregate receipts. In a casual way, when rosin would come in, I would glance over the rosin. The only thing that aroused my suspicion was the remarking, practically every barrel seemed to be remarked, regraded. The only lot we inspected was that car of 100 barrels that I refer to that I went through myself; 100 out of 9000. I have been engaged in the manufacture of soap about 25 years, and in that time have been buying rosin from different sellers. I have met a Mr. Hoyt; I saw him here to-day in the corridor. I think the first time I met him was in the late summer or early fall or last year in our factory. He came to see us to look over the rosin we had on hand, to see the conditions of affairs in our factory. He was not at that time in the naval stores business that I know of. I understood at that time, I had noticed in the papers that there was a suit against the American Naval Stores Company, and he represented himself as a Government agent, examining witnesses on that point. He presented me with a card, the only similarity between which and the one you show me, is that they both represent him as the special agent of the Government.

Redirect examination:

The only way in which he has represented himself was as a special agent of the Government.

C. A. SERCOMB, sworn for the Government.

Direct examination:

From April 1, 1907, to April 1, 1908, my company, the C. A. Sercomb Manufacturing Co., was engaged in the manufacture of laundry soaps in Milwaukee, Wis. I bought rosin from S. P. Shotter and the American Naval Stores Company under a written contract, which I have. I don't know where the rosin came from, but my contract was with the American Naval Stores Company in Chicago. Delivery prices were based f. o. b. Milwaukee in car lots, and Chicago in less than car lots, based on the Savannah, Ga., market, on the closing price of the market on the day the order was in. Deliveries pursuant to orders were made fairly promptly. Grades under the contract were guaranteed. The grades were not always right, and it is very difficult for any one to tell, but the grades were not right, that is they were lower than that was ordered. I had a conference once at Milwaukee with a representative of the American Naval Stores Company named Holmes in reference to the difference between the grades received and the grades ordered. I have copies of communications addressed to the American Naval Stores Company, and those I now hand you are correct copies. The contract is based on the present rate of 22 cents per hundred pounds from Pensacola, Fla., to Milwaukee, Wis., but I have no information as to how the rosin traveled en route.

Cross-examination:

Nobody representing himself to be Mr. Hoyt came to see me at my place of business in Milwaukee regarding this case; nobody visited my place of business to see how much naval stores I had on hand, which would be moderate at any one time, I believe my estimate that I would require 120 barrels a year under the contract is correct; but I do not know how many barrels I bought from the American Naval Stores Company. If I made the statement that it was a little difficult in regard to the rosin to determine the difference between grades I will qualify that, and say they positively did not give the grades, or any ways near it. I think I made the remark it was difficult, the same as a matter of pig iron, for instance, where a man of my experience no way to tell a No. 1 or a No. 2 from a No. 3 grade by the glance without analysis. My idea about the difference in grades of rosin is very much like telling the difference in grades of pig iron, and in the case of pig iron I would have to have an analysis to an extent. We use WG and N rosin. Now the difference I could only tell, I am not here as an expert soap-maker, you know it might be an optical illusion, the color would be so slight, but when it is as dark as your coat against this yellow color, then you naturally, if you were very near sighted or couldn't see good, you could tell the difference. I am able to draw that distinction by

reason that some of this rosin was as black as my coat, I have
137 samples to show that; and when I compared that rosin as
black as my coat with a light grade of window glass rosin I
could see the difference. There were two barrels containing rosin
as black as my coat in a shipment of 10 to 15 barrels, about two or
three; I guess that correspondence will show. I don't know what
grade of rosin that was, I am not an expert, but in talking with
somebody they told me it was Betsy Ann or Betsy something; I
think there was an analysis of it; that is the samples that I had were
graded, but by whom I don't know. I had the samples in my
pocket, and on the 26th of this month I gave them to Mr. Martin,
I think; I think Mr. Hoyt was also present. I would know Mr.
Hoyt if he came into this room. I did say that I would not know
him if I were to see him, but I thought of a Hoyt in Milwaukee, I
did not think you were speaking of this Mr. Hoyt. I was thinking
of their representative, Holmes, but I know this Mr. Hoyt, thinking
of him. I don't think I would know Mr. Holmes, the representative
of the American Naval Stores Co. if I were to see him. I would
know Mr. Hoyt, because I have met him frequently the last two or
three days, and he is a good looking fellow. I didn't know you
meant this Mr. Hoyt; I thought you referred to a man that neither
you nor I knew. The samples I had were three or four in a box,
were larger than those (referring to the standard set of type), quite a
little larger, some of them twice as large. No one requested me to
bring a sample. I brought the sample because there ought to be justice
done to me in a matter of a shipment, and I have had one sample
lying there some time of a very inferior grade, and I happened
to see it there and I put it in my pocket, that is I put it in the box
and the samples I had there I put in. I guess I had had the dark
sample and the others possibly five or six weeks, the correspondence
will tell. I got the samples because they were not what I ordered,
and I put them on my desk to one side to take the matter up with
them, which I did five or six weeks ago, but I don't think they have
settled yet. The reason I gave those samples to Mr. Martin was that
I kind of wanted to relieve myself of a burden in my pocket, and
was also requested to leave the samples there to be graded. Mr.
Martin, I think, made the request therefor; he told me that he would
have them graded, and therefore I left the samples. I guess there
were three samples. I don't know when I received the rosin from
which these samples were taken; they were received five or six weeks
ago. (Looking at correspondence.) They were received anywhere
between September 20 and September 26 of 1909; I am sure about
that; I am looking at my memorandum. I see there is an
138 error here in the date, because it refers to this shipment of
two barrels, and evidently a clerical error, so it would be
September, 1908, instead of September, 1907. Apparently from this
the barrels were received say last September. The samples were put
on one of the desks in the office to have the American Naval Stores
Co. to send me other barrels, which they said they would do, and
they haven't done it. I did not take them out of the barrel myself,
but did put them on my desk; I got the samples upstairs in the fac-

tory from a soap-maker, who opens every one of the barrels. I do mean to say positively that I know that those samples of rosin came out of barrels that were sold by the American Naval Stores Company to me. I saw the samples picked up from out of the barrel. There were two barrels of it that were very inferior, and I suppose the soap-maker took the samples out of both of them or one of them. I guess I did say that was sampled five or six weeks ago, but I might be in error, and I could be in error so far as that was concerned, but the two barrels were there just the same. I am still under the impression that the sampling took place later than last September because of this correspondence. The correspondence is rather confusing to me on this '07 being here, whereas just before I came away I dictated a letter, so it must have been 1908 instead of that, because I notice here that I had written to them complaining to them of these two barrels, and it is dated here September 26, 1907, when I believe I was moving my plant about that time; I am not positive in my mind that it is 1908, but I see it is here stated. It appears from this that the sample had been made before September, 1908; it was 1908, and it was prior to September, 1908, that I received this rosin. There were more than the two barrels out of the 120 or 130 or 140 or 150 barrels that did not come up to grade; we are speaking now of these two barrels, which were as black as my coat, and out of which I took the samples myself and put them on my desk, bringing them down here and gave them to this gentleman, Mr. Hoyt. I don't think that I made any statement that I gave them to Mr. Hoyt, I said I think I gave it to Mr. Martin. I don't know who Mr. Martin is, a policeman, or a sheriff, or a constable, or marshal, or something; I think he has some official capacity for the Government; he made no representation to me about his position. I don't think he ever represented himself to be in any capacity, but in the conversation one would naturally infer that he was. I came up to report and asked in the office there, Mr. Hoyt and Mr. Martin, if they couldn't get me on the stand, so that
139 I could get home; last Monday the 26th was the date I saw Mr. Martin. I did not ask Mr. Martin on the 26th of April to let me go home. I don't know why I gave Mr. Martin the samples that I brought here from Milwaukee. I gave them to him so as to have him get the grade; I don't know that he is an inspector of naval stores; I don't think I asked him to have them tested; I think he said he would have them if I would leave them; I couldn't say that he asked me to give them to him. I gave them to that particular man because that particular man happened to be there. Another man and the stenographer, I guess, were there, too.

Q. Why did you pick out of the three Mr. Martin to give this sample to?

A. Oh, he looked good natured. I gave him the sample, there were two gentlemen there, and they would certainly not go to work and misrepresent themselves as to what they were; I don't think Mr. Martin represented himself to be anything; I think I learned largely the next day who the men were, one of them Mr. Martin and the other Mr. Hoyt. I never saw Mr. Martin before the

26th of this month. That was a legal holiday, and I came here to see Mr. Akerman about getting off, and met Mr. Martin and Mr. Hoyt for the first time.

EMILE FABIAN, sworn for the Government.

Direct examination:

I was in the employ of the National Transportation & Terminal Co. at Tampa July to September, 1906.

Q. Who was the general manager of that company?

A. I was employed by Mr. Carl Moller.

I made out account sales and sometimes weight sheets for foreign shipments, had nothing to do with the records of the gauges of turpentine, but the sheets showing the gauges came under my observation when I made out account sales. Previous to my employment at Tampa I had been in the employ of the National Transportation & Terminal Co. at Fernandina, 1903, 1904 and the early part of 1905. I was discharged at Fernandina on the 1st or 15th of June, 1905, then stayed one year in Savannah, and left here on the 4th day of July for Tampa. I was in the employ of some of the defendants from April until June 1st, 1905, at Fernandina. It is hard to tell who employed me to go to Fernandina; I was employed, I think, by Mr. Cooper Myers here in Savannah to go to Jacksonville, and from Jacksonville I was transferred to Fernandina, I think,
140 by Mr. Carl Moller. My position with the National Transportation & Terminal Company at Fernandina was making out bills of lading; I had no part whatever in the preparation or issue of warehouse receipts. I think Mr. Cooper Myers was at that time vice president, I am not quite sure. I do not know in what capacity Mr. Moller was; he was previously in Fernandina and often directed matters. I think reports from Fernandina office were transmitted to the S. P. Shotter Co. here; Mr. Moller lived in Jacksonville; my recollections are very slight as to what reports were transmitted to him; some reports were made to Mr. Moller and others to the S. P. Shotter Co.

C. A. HOYT, sworn for the Government.

Direct examination:

I live in Jacksonville, and am treasurer of the Florida Electric Company. I have had mechanical training or experience. I have met Mr. Driscoll and know Mr. Carl Moller. I never met those two at the same time in conference. I never met Mr. Driscoll in Jacksonville at all; I met him in Savannah, but had no conference with him; just met him and passed the time of day. I have had several conferences with Mr. Moller in Jacksonville. I was in the employ of the National Transportation & Terminal Company, my recollection is, from about the last of October, 1907, to June, 1908. I could not say that I ever had any conference with Mr. Moller in reference to certain turpentine heating apparatus; I do not recollect whether it was with Mr. Moller or not. I do not remember how the

order was brought to me to make that apparatus. I do not recollect that I ever conferred with Mr. Moller in reference to it during the construction or after it was constructed. It was constructed in such short time that I do not remember whether I ever saw Mr. Moller during that time or not. The apparatus was a steam coil of about $\frac{1}{8}$ inch pipe, iron pipe about a foot in diameter, eight inches in diameter, made up I should say of ten or twelve single coils, and was to be used in the turpentine gauge tank, I think they call it, to gauge the quantity of turpentine, about fifty or sixty gallons capacity, an inverted T, so they could see the difference. It was intended for heating the turpentine in the tank. One effect of heating turpentine would be to increase its volume. I did not install the coil myself, but I was there and saw it when it was done. I do not recollect that Mr. Moller was there. It was not installed on

141 Sunday; I was present and giving directions about its installation. The experiment was on the yards of the National Transportation & Terminal Company at Jacksonville. The gauge or test tank was about 250 feet from the large tank. I did not take the measurement between those points. The steam that I connected with the experiment was generated about forty feet from the main tank. I did not at any time take the measurement of the large tanks, or either one of them, with a view to installing that plant and connecting that with the heat. I did not do any preliminary work or make any observations or measurements with a view to carrying that heat to the main tank.

Q. What measurements, if any, did you make on the yards of the National Transportation & Terminal Company for pipe connections from boiler house pipe to top of both tanks, leaving before the installation. What measurements, if any, did you make for pipe connections from boiler house pipe to top of both tanks in the yards of that company in Jacksonville?

A. There was a pipe running along the ground by the side of the two large tanks, for use in case of leaks in the bottom of one of the large tanks, so a hose could be screwed on that pipe running along the ground and taken along from the top of the tank and put in the tank. I found that that hose was in bad condition, and after some consultation, decided that it would be the best to do away with the hose altogether and put permanent pipe, galvanized iron pipe, from this water pipe along the ground, so as to use in case of a leak in the big tank. I made the measurements for that pipe.

The boiler house pipe is the connection used there simply because the water pipe was in the boiler house; it had nothing to do with the steam.

Q. Under what circumstances would you put water in the top of a tank of turpentine?

A. Water would go to the bottom if there was a leak in the bottom of the tank, and that is the only condition where we used it, where there was a leak in the bottom of the tank, right near the bottom. If you could put some water in there, and make the turpentine rise above that, it would make the water leak out.

There is no difficulty about running the pipe in the bottom if we

had the turpentine out of the tank so we could have tapped it. I have never made any examination of the bottom of the tanks of the National Transportation & Terminal Co. in Fernandina; I looked them over once to see that the lightning arresters were all right, and to see there were no excessive leaks. I never saw the inside
 142 of any one of those tanks at Fernandina, and do not know how far up the pipe leads into the tank.

I could not say exactly who told me about the construction of this experimental steam coil, whether I was directed to do it by Mr. Moller personally, or it came from him to me through somebody else.

Cross-examination:

I am aware of the fact that turpentine is lighter than water; and it is correct that in the event there was a leak in the tank and the water was put into the tank, the turpentine would rise, and if it was anywhere below the level of the turpentine the leakage would be of the water, and not of the turpentine. There was an old hose that was intended to be used at the large tank; that hose I found to be worn; and I suggested that instead of using the hose it would be better to construct a pipe leading from the pump in the boiler room. There was a pipe already from the pump along the ground; this hose was right at the tank at which it was to be used, and run up, and my suggestion was simply from that main pipe to the top of the tank; the idea being to substitute the pipe for the hose which was worn out. There was a man-hole in the top of the tank; the pipe was not permanently connected with the tank, but my intention was that in case of necessity the pipe could be turned so that the water could go into that man-hole and into the tank; that was not done at the time I left. The purpose I was seeking to attain was to avoid the loss of turpentine in case of a leak. This pipe was not connected with the steam boiler or the boiler house at all to my knowledge, and I was familiar with the conditions. It is my understanding that no heat could be transmitted through this pipe, because it was not connected with the boiler; it was intended for the transmission of water in case of necessity, and not for the transmission of heat. There was no concealment of any kind in or about the work, I did not use any precaution. My understanding was that I was requested to make an apparatus for the purpose of experiment, and consisted of an iron pipe or coil about eight inches in diameter, with about ten turns in it. I should think that the small measuring tank contained about 55 gallons, about the contents of a barrel; and my purpose in constructing the coil was to determine what relative effect heat would have upon the expansion of turpentine; whether it was carried through I do not know. My understanding was that the purpose
 of the coil was to determine what would be the expansion of
 143 the turpentine under a given number of degrees of heat. I have no recollection of any improper suggestion made to me at the time of receiving instructions for the construction of the coil. I never saw it used at all.

Redirect examination:

I took the measurements for the water pipes inquired about on cross examination, but did not install the pipes. A real warm day in August would show the atmospheric change and expansion of turpentine in an ordinary barrel; and the contrary on a cold day in January. Nothing was said as to what temperature the appliance should be constructed to raise turpentine.

Recross-examination:

The large tank to which I refer holds approximately 5000 barrels.

WM. H. HOSKINS, sworn for the Government.

Direct examination:

I live in Jacksonville, Fla., and am now employed by Standard Oil Company. From April, 1907, to the last of the year I was employed by the National Transportation & Terminal Company, of which Mr. Carl Moller was the general manager. As a rule I looked after the shipments at the ship on the Clyde wharf, and looked after the receiving of the turpentine on the yard from the inspectors, that is after the outage had been taken and the barrels gauged and regulated by the inspectors. As a rule the inspectors would leave the barrels a gallon out, they would turn it over, it was my business to look after the outs of the turpentine. Each barrel was supposed to be packed within one gallon of the bung hole.

Q. After that was done, and these barrels came to you for attention, then as to transactions occurring in the presence of Mr. Moller we want to know what removal of turpentine was made from those barrels habitually?

A. I do not know that Mr. Moller ever paid any particular attention, but he has been there during the time that this regulating was going on, and my orders from Mr. Woods, who was acting as custodian of the yards, was to always use my own discretion, and

144 when the weather was cool to take about a gallon, and if the weather was warmer to take out less, however, we always after the inspectors turned it over to the American Naval Stores Company took out from a half to a gallon.

With that we would fill other barrels, and put them in the American Naval Stores Company stock; we would fill them and ship them whenever we had shipments. I had a conversation with Mr. Moller at his home one morning. My orders the day before were not to do any cooping at the ships for any one except the American Naval Stores Company on the Clyde wharf, so I went to Mr. Moller the next morning to find out if I could continue to work for both companies, the American Naval Stores Company and the Patterson Export Company. Mr. Moller told me on that morning that I could not. He said, "Hoskins, you will have either to work for the American Naval Stores Company, for this company, or for the Patterson Export Company; but you will have to be either against us or for us, and you have been employed by the American Naval Stores Com-

pany long enough to know that this company will not stand competition." That is about his exact language, as I recollect it.

I saw the experimental coil installed in a tank on those yards; Mr. Moller, Mr. Wood and Mr. Driscoll, I think that was his name, had it installed. It was on a holiday, but I do not remember what holiday, nor the date. All the work was done away with, and myself and one or two more men were informed to be back the next morning at 7 o'clock, the usual hour. Ed Carr connected the coil. Mr. Wood, Mr. Moller and Mr. Driscoll were present when the steam was turned on; I was then right at the place. Turpentine was in the tank. I do not know how long the experiment continued, I left before they finished by orders; Mr. Woods, the custodian of the turpentine shed for the National Transportation & Terminal Company told me, "Hoskins, don't try to listen to everything." Mr. Hoyt was not present, he didn't show up that day at all.

Cross-examination:

The tank to which I refer was a small tank of about 55 gallons capacity, or about the capacity of a barrel, and was used as a measuring tank. I don't know the object of putting the coil in there. There were about four of us there that day, all getting there at the usual hour. I do not think Mr. Driscoll lived in Jacksonville. They were expecting him to come and make a general inspection, from some other place. I don't know that being a holiday it was
 145 about the only day those gentlemen could get together to make an experiment; no other work was going on at that time. The Patterson Export Company was engaged in exporting naval stores in Jacksonville, and the National Transportation & Terminal Company had its yard there. That yard was perfectly open, we men went through them as we pleased; I don't know that there was any concealment. I am aware that turpentine expands under the influence of heat, in cold weather a greater amount would be taken out, and a smaller amount in hot weather. Mr. Moller was the general manager of the business of the National Transportation & Terminal Company in Jacksonville; he had no more conversation with me in regard to competition than I just explained; he told me that I must either work for the Patterson Export Company, or work for him; I do not know that those were the exact words, but they were similar to those words. I know that both of the companies were in the same business. I was discharged from the company. After my discharge I have had no conversations with Mr. Hoyt until my arrival in Savannah last week. I knew Mr. Martin in Jacksonville, I believe he was secretary and treasurer of the Patterson Export Company; I have seen him several times here, but have had no conversations with him since I have been here; and I did not have any with him in Jacksonville in reference to this case. I never talked with anybody about this case before I came here. Many of the barrels to which reference has been made would go down to the wharf, where they would have to be re-bunged, and everything done that was necessary to get them off in good condition. In re-coopering I do not remember any instance in which I found

too much turpentine in the barrel, so that I would have to take some out. I was not discharged because they thought I was neglecting my work, or for lending money to my fellow workmen; if either one of those was the cause they did not explain it to me. The cause given was for fighting a man on the yards.

Redirect examination:

There is a board fence around the yard about eight or ten feet high, with the planks right close together. There is a board wall around it, excusing the openings at the railroad tracks. I looked after the domestic shipments, which generally went to New York.

146 A. SESSOMS, sworn for the Government.

Direct examination:

I live at Bonifay, Fla., 108 miles from Pensacola, and am in the producing of naval stores in country adjacent to Bonifay, being interested in eight places. I was put in charge of a turpentine still and commissary when I was 14 years old, 40 years ago next month, and have been in the business continuously. It has been my effort all my life to familiarize myself with the business, and I think I have a pretty fair knowledge of the business by reason of the information I have gathered. During the turpentine season, beginning April 1st, 1907, to April 1st, 1908, in the States of Georgia and Florida, the average cost of producing a gallon of turpentine was from 50 to 55 cents, and \$3.50 to \$4.00 for every barrel of rosin, that is the average of all grades of rosin, aggregating them and placing them all at the same price, and the average of turpentine. My answer was based upon the opinion that there is a maximum and minimum cost, and my statement is based upon the average between those two extremes.

Cross-examination:

I said that my calculations were based between the two extremes, and brought them together, but adding the two extremes and dividing them by two will not give you the average. I got the average from careful calculation. There is quite a variety of places and locations which all differ. If they were all in the two extremes, then the addition of the two and division by two would give you the average. Many items enter into the cost, such as the price of timber, the price of the still, dip barrels, turpentine tools, labor, putting up shanties, construction of the plant; the distance the crude gum has to be hauled to the still; the character of the road over which hauling is done; the distance of the still from the railroad; the distance for which freight charges must be paid. The prices of supplies are to be considered, as well as the price of labor, and its efficiency, all of which vary from time to time. I think it is possible that while two producers might agree practically exactly in a mathematical way as to the figures of the cost per gallon at the market in Savannah, there would be some variation in a great many instances among

a great number. During the period named I approximate the number of producers in Florida at between six and seven hundred, and about seventeen hundred in the whole territory, which takes in the States running from North Carolina to Texas, both inclusive. There are very few in North Carolina; I simply approximate the whole, and do not recall the figures as to the number of producers in North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana or Texas. I interviewed quite a number of producers in North Carolina as to the conditions that surround them and the cost to them; I have got a brother or two there engaged in the business; I made personal inquiries of half a dozen, more or less, in North Carolina; I don't recollect the number in South Carolina, and would not undertake to recall the names. I have met a great many and have conversed with them. It has been my business all my life to compare the outcome of our operations in order to be posted, and with the hope of benefiting myself with the information. I did not see any in Texas; I have seen some that were operating in Texas during that period, but I couldn't tell you how many, nor how many crops each one of them made, not the cost of each crop. I didn't see any in Louisiana; I saw several who operated there and talked to them, but I don't recollect the number. The same is true in Mississippi. I have talked the matter over with perhaps one hundred; and from the statements made by one hundred different people I determined what is the cost of production of seventeen hundred people.

Redirect examination:

I am the vice president of the Turpentine Operators' Association, and in that capacity I have met hundreds of them. I mean that I personally interviewed them and compared notes with them. I would casually speak of it and get their statements, but I did not make careful comparisons with hundreds of them.

Recross-examination:

The barrel of rosin I speak of is the commercial barrel, 280 pounds.

F. L. SWEAT, sworn for the Government.

Direct examination:

I live at Douglas, Ga. I am in the producing end of the turpentine, or naval stores business, having been engaged in it about 23 years, being connected with the operation of ten or twelve or fifteen places in the States of Georgia, Florida, Alabama and Texas. I would say that for the turpentine year 1907 the average cost of production of a gallon of turpentine was about 50 cents and about \$4.00 on the standard average barrel of rosin to come out after paying interest and lease on timber and everything, the present condition of the cost of supplies, and so on.

Cross-examination:

Interest does cut some figure, but if one has the cash I figure that one's money is worth a certain rate of interest. Supplies, mules and everything of that kind can be bought a little less for cash than on credit, and one with good credit can buy to better advantage than one with poor credit. The experience of the man doing the work, whether he is sober and attends to his business, has something to do with it. The figures I give are the average. I think that I could take a fine class of timber, well located and good conditions all around, and perhaps play even at forty cents a gallon, and I have seen places where you would do well to play even at 55 cents. A good deal of timber being blown down by a storm would make it cost more, and that enters into it. Of course you cannot tell what naval stores will bring, but you can figure on about the cost, what it is going to cost you to produce it all right, you won't miss it much. Turpentine has sold as low as 25 cents and rosin at \$2.00, but you could buy a sack of meal for 80 cents, and oats were cheap. Feed stuff and everything is higher than it was then; timber is high. The product of our Florida place we shipped to Jacksonville, and in Texas we sell to the Union Naval Stores Company right on our side track. We ship to the Consolidated and Barnes & Jesup in Jacksonville.

D. H. McMILLAN, sworn for the Government.

Direct examination:

I live in Jacksonville, and have lived in Florida since the Fall of 1895. I am vice president of the Consolidated Naval Stores Company. I am in the turpentine business, wherein I have had about 25 years' experience, all the way from working around the still up, in the producing end and factor, having been connected with some 25 or 30 producing plants in that time in Georgia and
149 Florida. In the turpentine year of 1907 to April 1908, my judgment is that the average gallon of turpentine under average conditions, if rosin is bringing from \$4.00 to \$4.25, you would have to get in the fifties in the turpentine to come out even.

Cross-examination:

The Consolidated Naval Stores Company is engaged in handling naval stores, selling them; I have been vice-president of that company for five years, ever since it was organized. During that time I have had several partners in the naval stores production, have got about twelve now. My estimate is based upon the statements made to me by my partners, and by my own figures, the figures that we make together. During the past five years my duties have kept me in the office most of the time I have made an estimate of the cost of production of naval stores each year since I have been in the business, since 1891. I do not remember what the cost in 1891 was throughout the entire naval stores producing territory, but it was much less than it is now, than it has been recently. It was about half, or maybe below, in 1891, to what it is in the last few years;

and it was about half in 1892 of what it is now. I do not know the cost of 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900 or 1901. In 1902 the cost began to go up, but I do not know the cost; I would have to go back and get the cost of manufacturing it, and the price of the turpentine, to see how much profit there was in it. I do not remember the cost in 1903, 1904, 1905 or 1906; so that during all that period of time when I made up estimates I cannot give any information. From the 1st of April, 1907, to the 1st of April, 1908, it cost a great many operators more than it does me; it would cost me about the figures that I gave to you a while ago, about 52 cents and about \$4.00 a barrel for rosin. I have been giving my best endeavors to producing to the best advantage, and had the advantage of financial facilities whereby I could buy for cash. I did not attempt myself to be the producer, doing that through other people. Numbering my places from 1 to 12, I do not know what it cost at number one, that is about what it cost me on the average; I can bring you a statement of each place. One of my places has been put out of business since April, 1908, because we could not make any. Taking the oldest of my places as No. one, it cost in 1907 in the neighborhood of 50 cents to produce a gallon of turpentine, that is it might come a cent under or a cent or two over. It cost about the same at

150 numbers two and three. I do not mean to say that at those twelve places the cost of production was the same at each, I have got one that didn't cost me quite that, and I have got one that I have just told you was put out of business because he could not make it. To some extent the cost of production of each place will depend upon the condition of the place. The first item on the sheet I hand you is rent of one crop of boxes for one year, \$500.00; that depends upon the character of the timber, whether round or back boxed, and of good quality; the number of trees per acre does not have as much to do with it as the quality. It will depend further upon how far that timber is from your still, you will have to strike an average on that; and I struck an average of about four miles from the stills to the railroad. I estimated there were something like 1000 producers in the naval stores producing territory from North Carolina to Texas, both inclusive, with about 600 in Florida. I am not claiming that I know anything about the distance of the stills from the railroads; I have done that by taking the distance of the stills that I do know; that will come mighty near averaging every one of them; I figured on my own. If you will take the whole thing they won't make 20 barrels to the crop, I have got 40 down there, that is all the operators that ship to the Consolidated Naval Stores Company won't get but about 20, 21 or 22 barrels of spirits of turpentine to the crop; I reach that conclusion by figures on our books. My figures are derived from the calculations that I make off of one of my places, the statement I make to you. I averaged my places at four miles, and I know pretty well how the others are situated that ship to the Consolidated Naval Stores Co., there being about 200 shipping to the Jacksonville office. I did not personally go to each of those two hundred places, I went to some of them, but how many I do not know, maybe a third of them; and the average distance of the timber from the still was four miles.

J. H. WAGNER sworn for the Government:

Direct examination:

I live in New York City. On or about November 21, 1907, I was in the naval stores business, being manager and secretary and treasurer of the John A. Casey Co., New York City, manufacturers of rosin, oils and its by-products, jobbers in turpentine and rosin.

We buy most of our material or goods in Savannah and
151 Jacksonville on a cif basis, which means cost, insurance and freight. Say the market here for turpentine might be 36 cents, we bought our turpentine at $38\frac{3}{4}$ cents, cost, insurance and freight, which means New York dock or yard delivery. We buy right in the open market; we are buying turpentine and rosin from the American Naval Stores Company and as a rule we ascertain the price from them; if the price is advantageous we buy from them or buy from the cheapest party. We buy on the same basis from the American Naval Stores Co., that is basis of Savannah, plus freight and insurance; their terms to us as a rule on turpentine are $21\frac{1}{2}$ cents. We buy from them on the same basis that we buy from others, $2\frac{1}{4}$ cif above the price of Savannah delivery, either from Brunswick or Jacksonville or Savannah. We bought on or about November 21st, 1907, I won't be sure about the date, about 50 barrels of turpentine from the American Naval Stores Co., on New York terms, that is, not on terms as I explained before. We run short of turpentine at the time and we had to buy 50 barrels, quick delivery. We bought it say in the morning, and took delivery of it that afternoon. It was delivered to us right in their own yard, the National Transportation & Terminal Company in Brooklyn, which is across the river from New York City. We found when we received these 50 barrels of turpentine and had them examined by our gauger that they run short on those gauges, to the best of my recollection 30 gallons.

Some of the barrels run a gallon short, others a half gallon. The gauge cut on the package for instance might have read 53, while the actual contents of that barrel possibly could not have held more than 52 gallons gross, that is if the barrel was filled right up to the bunghole it could not have contained more than 52 gallons. The outage as nearly as I know was correct, one gallon. All barrels as a rule are, I understand, that are shipped from Savannah or Jacksonville or any other Southern port, are shipped one gallon out. For instance gross gauge 53. There is practically 52 gallons only put into the barrel. That is not the gallon that we missed, or that was short in our measurement. The gross gauge indicated on the package, cut with an iron, for instance read 53, while the barrel possibly could not have contained more than 52 gallons; it contained 52 gallons in this particular barrel that I spoke of, the gauge of the barrel was 53 and we received 52 gross, less one gallon usual outage, that is we actually received 51 gallons. To the best of my recollection Mr. Harry Turner, formerly of Savannah, then representing the Patterson Export Company in New York City was present at the examination of the contents of those barrels, as well as Mr. J. H. Hart, of Toler, Hart & Co., of New York City.

152 Cross-examination:

The yard of the National Transportation & Terminal Co. in Brooklyn is the yard in which we sometimes stored our own naval stores; it is not confined to the storage of stock of the American; I believe anybody can store naval stores in the yard of the N. T. & T. Co., in Brooklyn. We have had more than 2,000 barrels of rosin on storage there at one time, and continue to use the yard for storage purposes as our business requires, and have found the transactions between ourselves and the N. T. & T. Co., absolutely satisfactory.

Q. You know sometimes spirits are reinspected before sale in New York, regauged?

A. By this company you speak of?

Q. By either the buyer or in the trade. In a word, say you ordered out 50 barrels of spirits, or buy 50 barrels of spirits; then it may be reinspected, regauged; that is true, isn't it? The original gauge mark for instance put on at the port of Tampa?

A. Yes sir.

We would deduct the outs when we buy, provided we bought on New York terms. In this case we wanted quick delivery of the 50 barrels in question for immediate use. Turpentine leaks from the packages, is very susceptible to leaks, and I believe it also evaporates. The greatest care has to be taken to prevent leakage of a barrel of turpentine, the inside of the barrel being coated with gum. We bought as much as 5,000 barrels of spirits a year, buying in the open market whenever we please, and are buying now and have been for some time more or less from the American Company, probably buying half of the 5,000 barrels from the American. In the instance of the 50 barrels referred to, there were 30 gallons short in a total of 2500. I believe that there were one or two other lots in which there were small differences like that. The Patterson Export Company, whose representative Mr. Turner was present, and Toler, Hart & Co., of which Mr. J. H. Hart is a member, were competitors of the American; and the result of the inspection made in the presence of those two competitors on that quick delivery order of spirits of turpentine was that in the gross contents of 2500 gallons there were about 30 gallons short. The barrels were gauged right at our place of business, about a mile and a half from the yard of the N. T. & T. Co. in Brooklyn, whence they had been brought by our own team. I cannot really answer why Mr. Turner and Mr. Hart happened to be there; both parties had their offices close by, and

153 it is customary that in the morning hours they visit each one to find out what is new in the market and how the southern market is and so on, whether there is any information from the South as to sales and so forth, and they just happened to be there, if my recollection serves me right. Our inspector happened to come into the office and call us out onto the sidewalk to see the turpentine and the two gentlemen walked out with me. The delivery was in the afternoon; I don't know why those gentlemen were there, I cannot answer that intelligently, they were not called by us. In my experience it is true that there is more or less leakage that will hap-

pen in spirits of turpentine; and whether this inspection was made accurately or accidentally I have no knowledge; and when it was inspected, gauged subsequently, it was gauged in the presence of these gentlemen Mr. Turner and Mr. Hart. I believe that a difference of a quart or two quarts may very well take place in the gauging, by reason of the adjustment of the dip-rod, and the angle perhaps in which the party adjusted it, and in the reading of it.

Redirect examination:

It is not likely that the error of two quarts would occur through the whole 50 barrels unless the same mistake was made on every barrel; the shortage of 30 gallons was distributed through the lot. None of the barrels was leaking. If a barrel is discovered upon the terminals to be leaking, it is recoopered; turning a barrel of turpentine is dumping it and putting it in a new package which is sound, and that is done. I do not know whether other people store at the yards of the N. T. & T. Co. The only stuff we stored there was our purchases from the American.

The stuff that we stored at that yard, being purchased from American, was at the time of the purchase at the warehouse of the Brooklyn Terminal Company, at the storehouse, the yard of the National Transportation & Terminal Company.

J. H. HART, sworn for the Government.

Direct examination:

I am a member of the firm of Toler, Hart & Co., doing business in New York, and was so engaged in November, 1907. I could not say how I happened to be present at the time of inspection of a certain

50 barrels of spirits of turpentine, sold to J. H. Casey & Co.

154 I either was coming from my lunch and passed there or Mr. Wagner sent for me. But there were about, I should say,

16 or 18 barrels of it; but it had been gauged if I remember rightly. I suppose it was probably one o'clock. My going there was not the result of any premeditation or anything of that kind. I could not say just how much we are interested in the naval stores, we do a factorage business and jobbing business; we buy and sell turpentine, and also receive it on commission. I do not know that it is any interest to me what price the producer gets for it, or the consumer pays for it, so far as the jobbing is merely concerned. I am not merely a broker, I am a principal; I buy the goods and sell them. As a factor I receive goods on commission and sell them on commission. I do not know who are the three largest dealers in naval stores in New York City, but I should presume the American, and probably Mr. Casey, and Mr. Seely or Mr. Larenden. I do not know whether Mr. Seely is a competitor or not, but I suppose he was. All I can tell you about his business is that I sell him goods; he and I are in the jobbing business. My recollection is that on that afternoon there were present Mr. Turner and Mr. Wagner and I think Mr. Wagner's gauger.

Cross-examination:

I know that turpentine is easy to escape, difficult to retain it, the barrels must be perfect and very right, and that the interior of the barrels is glued. I saw only 16 or 18 barrels, and they had been gauged before I saw them. I do not know whether they contained one gallon or half a gallon or a quart or a pint less than the gauge marked.

CHARLES LILLY, sworn for the Government.

Direct examination:

I live in Indianapolis, Ind. In 1907, I was a varnish manufacturer, and used spirits of turpentine, buying ordinarily from the Standard Oil Company. In 1907, we contracted for two tank cars from the American Naval Stores Company. The paper shown me is a copy of an order we gave the young man when he was in our place, and this indorsement appears on it "American Naval Stores Company by W. E. Henlmes." Holmes was the agent of the American Naval Stores Company located, I think, in Chicago. I 155 made this contract in our office. The paper shown me is a copy of a letter written May 16, 1907, from Lilly Varnish Co., to the American Naval Stores Company, to whom the original was mailed. The next paper is a letter of June 5th, to American Naval Stores Company from Lilly Varnish Company; then a letter of June 8th, to the American Naval Stores Company from Lilly Varnish Company; then an invoice of June 1907, for a tank car of turpentine from American Naval Stores Company to the Lilly Varnish Company. The invoice is for one of the tank cars we had given an order for. The last paper is the allowance they made us for delay in shipping the turpentine. The car was ordered under date of May 16th, 1907, and showed the purchase price to be the price of that date. The market on that date was 60 to 61 cents in Savannah, we bought on the Savannah market. We waited for the car and we wrote them two or three times, getting no reply and finally telegraphed them, canceling the car of turpentine, we could not wait for them any longer. Upon receipt of our telegram they wired us or called us up on the long distance, I do not remember it was from Cincinnati, their office, and said that the car had left some point in the South on the 6th of June, they claimed two days before our telegram of canceling. The invoice was figured at 61½ cents, I don't know what market that was. I can't tell you exactly when we received this turpentine, probably ten days after date it was shipped; we declined to receive it when it came in. I cannot tell you exactly when we actually decided to take this particular tank, but it was some little time after; we had a row over the price and delay. They held this car up for three weeks, and in the meantime the price had gone down to 57 cents. When I bought that turpentine of Holmes, he assured me that they had ample facilities for shipping this turpentine, that they had tank cars. The market was 60 to 61 cents, and it was 57 cents at the time they billed it to us; they billed it at 61½ cents. We had quite a wrangle over it, and we talked over the long

distance a long time and finally they offered to take 60 cents, and we agreed to pay them 60 cents provided they would cancel the other car, and they demurred as to that and it took a day or two they had to wire or communicate with the home office, but finally they accepted the 60 cents, we paid for the car, closed the transaction, and they cancelled the other car. They paid us the difference in the bills, I remember it as \$99.00, the difference between 60 cents and 61½ cents, the market in the meantime having declined to 57 cents.

156 Cross-examination:

I do not know whether those cars were to come from Pensacola. I think a freight congestion existed at that time to a degree all over the country. The price was fixed on the Savannah market at the time we ordered the car. The tanks were not even shipped in a reasonable time; I do not know why they were delayed. Both tanks did not reach us. When the first one reached us we declined to take it, on the ground they had held up the order and the market had declined in the meantime, and we felt that we should have some advantage of that decline. The price at time of delivery was 57 cents a gallon. I have not the original letter of American Naval Stores Co., on June 10th; this is a carbon copy of the letter; I remember a letter like that.

Q. So that in point of fact, the real controversy with you gentlemen was that this tank car was delayed by reason of the fact that we couldn't get the railroads to haul it. That was our reason for not delivering it to you. Now you said that you ought not to be held responsible for that difference in price, that was your contention? I state your position correctly, don't I?

A. Yes, sir. We closed up this business difference between us by their relieving me from taking the second car; they offered to take 60 per gallon and we agreed to pay them 60 per gallon provided they would cancel the second car, that was agreed to by us, and they paid me the difference between the 60 cents and the 61½; that was the whole of that transaction. With reference to our copy of the contract ordering the two tank cars, about last August or September, a man representing himself to be a representative of the Government, came into our office and demanded the paper; we did not voluntarily give it to him; we demurred and asked him "If I refuse point blank to give up this paper, what will you do?" He said, "We will get it anyway, so you may as well give it to us." You know we have a right healthy respect for Uncle Sam, most people have. So I gave up my private paper to the man, whose name was Hall, that is the gentleman there. I have been in the varnish business for some time; the business of Mr. Boardman, one of the defendants, is that of gum merchant, I have known him 20 odd years, and he is a man of the very highest character and reputation.

Redirect examination:

157 The adjustment was made on canceling the order for the second car. We would not have taken the car at all, I mean at the price. Our objection was to the delay in the shipment,

there was no special delay in the shipment of the car after it started. The special agent of the Government did not explain to me the method by which it would invite me to come to Court and bring the papers with me; nothing was said about the method to be adopted. I was not in any physical fear of anything of that kind. He said he was a special agent of the Government; I do not remember that he exhibited to me any authority to represent the Government. I did not know the man before; never saw him before that I know. No relationship existed between me and him. I delivered to him at that time the papers you showed me.

G. A. BERGHOFF, sworn for the Government.

Direct examination:

I live in Fort Wayne, Ind., and was engaged in the manufacture of soap and soap articles there from April, 1907, until April, 1908. We use a considerable quantity of rosin, which we bought from different naval stores companies and producers. We made some purchases of rosin from the American Naval Stores Company. The orders were mostly placed through the mail, addressed to the American Naval Stores Company at Cincinnati, Ohio. In the period from May 1st, 1907, for the rest of the year there was some difference in the character of the grades received against the grades purchased, in that they were not up to the mark, and some of them I think graded down to I Two grades, M and K intervene Between I and N.

Cross-examination:

I do not remember what allowance we received for the difference in grades; we went through the shipment and found out that there was a difference in some instances. I do not remember whether the complaint was adjusted to our satisfaction. I know we had a great deal of difficulty in getting the adjustment. We needed the rosin; needed it bad and could not have much correspondence about-it. I do not know how many barrels there were in which this difference arose; in a word we bought and used the grades, we were compelled to use as they were received, and a good many times we noticed that there was a difference in the shade, and of course, inasmuch as we needed the goods, I think we used some that we did not really complain about because we needed them bad. I cannot even approximate the number of barrels on which complaint was made by us to the American during that period, more than ten, about 25 or perhaps more, I won't say. I did not personally sample them to begin with; my attention was called to the grade by the superintendent and then I instructed him to go and draw a sample from the barrel and I believe that I have gone up there at different times myself when they were working at it. I believe we opened the top, I do not know exactly, but opened up one end and took out a piece perhaps four or six inches from the top of the barrel. We went down quite a ways, took a piece out and cut it into a cube size, about an inch.

Q. And you then, after thus getting it, you or your superintendent used your judgment about how it graded?

A. No, we have a standard cube there. I could not tell how many barrels we consumed during that period from them, because our purchases were very light from them, we bought mostly from other people. We bought approximately 3,000 barrels during that period. We renewed the type about every six months, we got them from the East somewhere. When we would make a complaint sometimes a representative would come up and see about it with the purpose of giving us satisfaction; and finally all those little matters were adjusted between us, and we are still buying rosin from the American.

Redirect examination:

The reason I assigned to these gentlemen for not entering into a contract was that I did not think it was the right thing for me to do to obligate myself to buy the requirements of my factory from one firm.

Recross-examination:

That statement was made to the American Naval Stores Company through their traveling representative last year, I think it has been repeatedly, most every year. It has been asked most every year, and I think during that period. Asked to enter into a contract to buy my requirements.

Q. A drummer would come in and ask you to buy from them and you would decline; is that the idea?

A. I do not know whether that is it, buying, and he met us at a certain time of the year and I was asked to make a contract for the requirements.

159 Redirect examination:

I said to them that it was not wise, I thought it was not prudent to bind myself to buy from one; I believe I have said as much that I would sooner hold the way open with other parties; I might rather want to buy from somebody else.

CHARLES LILLEY, recalled for the Government.

Direct examination:

I asked to be allowed to make some explanation about my statement as to my relation with the gentleman who saw me and represented himself as a special agent of the Government. He is related to my wife, second cousin.

Cross-examination:

He was a stranger to me, I had not seen him since he was a — we were pleased to entertain him at our house. I think he introduced himself as her cousin when he first came into the office, and demanded at the time that I should give up my paper.

THOMAS GAMBLE, JR., sworn for the Government.

Direct examination:

From May 1, 1907, to April 1, 1908, my business in Savannah was publishing the Naval Stores Review. The two papers shown me were issues of my paper. I received the advertisement appearing on page No. 16 of the issue of my paper of February 22, 1908, from the American Naval Stores Company, in Savannah, in this district. The advertisement on the outside of the back cover of that same publication was a continuation of an advertisement I had been carrying for several years, I do not recollect who sent the exact copy for this advertisement, I suppose either Mr. Myers or Mr. De Loach, one or the other, the president or secretary of the company. The bill for that was rendered to the National Transportation & Terminal Co., and the bill for the advertisement of the American Naval Stores Company. I sent to it. The bill was paid by one check of the American Naval Stores Company, and two vouchers made for the separate companies, my bills were made out to the two separate companies, and I signed the separate bills. I examine the issue of the same paper of August 24th, 1907, the outside of the back sheet, and page No. 16, and the same statement applies in substance to this. Those advertisements were carried for several years, at least I think the advertisement of the National Transportation & Terminal Company had been running four or five years, and I think Mr. J. F. C. Myers sent me the first advertisement of that. The American Naval Stores Company advertisement, I think Mr. S. P. Shotter, one of the defendants, gave me personally.

Counsel for the Government then read the advertisements in evidence. He also read in evidence the contract with American Naval Stores Co., and the letters identified by the witness Chas. Lilly.

D. H. McMILLAN, recalled for the Government, for the purpose of continuing cross-examination.

My estimate of the cost of production was based upon information as I received it from my places, which are tributary to Jacksonville. Economy of administration, the management of the place as an important factor in determining the cost of production. When prices are low, the producer generally has to be more economical in the management of his place; generally the labor decreases because you press it down. The labor has been depressed down and down the last few years until they can hardly live, that is the result of low prices. When prices are high there is generally an increase in the cost of timber and labor. The natural law in the market is that the price of naval stores depends upon the supply. The Naval Stores Export Company did hold some spirits out of the Jacksonville market for speculative purposes, but it don't seem that that helped the price any; it was a large quantity that was bought at the high price of 62. I did not take that into consideration in my estimate of the cost of production. I know Mr. Hoyt, but not well; I am not sure I know him when I see him. I know one Mr. Bates, but not well; I have not seen him but once or twice. The Consoli-

dated did not pay Hoyt and Bates for their service, nor through its office; it did have Bates working for it at one time; I presume
161 he was paid through its office. I did not meet with Mr. Martin at Mr. Toomer's office in regard to the prosecution of this case. I presume Mr. Coachman employed Mr. Hoyt for the Consolidated Company; I do not know who employed Mr. Hoyt.

I would like to state, if you would allow me, that my report of figures is not full; I left off rosin barrels and spirit barrels and freight on the products to the market. At the time the spirits were bought by the Naval Stores Export Company, I think Col. Toomer was its president.

Redirect examination:

The spirits were bought in 1907, at which time Mr. W. C. Powell was the president of the Consolidated. Mr. Bates was in the service of the Consolidated for a while, and was out in the western territory; really I do not know just what information he was getting; he was getting some for the benefit of the company. The Consolidated Naval Stores Company is receiver of turpentine, that is a factorage business, and sell their products on a commission basis to the different buyers, mostly to the American Naval Stores Company, that is about 65 per cent. of our stuff in Jacksonville. No sales were made by the factorage companies or our company direct to the consumers; we are not engaged in the same line of business. In the business of the Consolidated I come in direct contact with the producers, all of them that come to the Jacksonville office; talk with them, discuss the general situation in the woods with them. A crop of boxes is 10,500.

Recross-examination:

In regard to matter of prices of production and so forth, I do not gather part of my information from the Industrial Record of Jacksonville: I do not base it upon statistics of the receipts and prices, I base it upon coming in direct contact with the operator in my office; and I would like to state further that my statement is made up from the basis of my own places. If you will take it as a whole,, it is a great deal worse than that; my places are a little bit above the whole thing.

162 J. F. MARTIN, sworn for the Government.

Direct examination:

I live in Jacksonville, Fla. During the past six or eight years I have been engaged in the distributing end of the naval stores business principally. I first entered the service of the Florida Naval Stores & Commission Company in 1901, as their agent in St. Louis; followed a year later by being made the general western agent at Chicago, and about the middle of that year I was sent abroad, where I remained some three or four months and came back, and remained in the service of the Standard Naval Stores Company, which was the distributing concern at that time handling the rosins for the

Florida Naval Stores & Commission Company, and then I was a short time with the National Transportation & Terminal Company in their yards at Jacksonville, one of the defendants in this case. Transferred from there to the Philadelphia office and from there to the New York office of the S. P. Shotton Co. I left their service to go with the Naval Stores Export Company when it was formed in the spring of 1905. I knew Mr. C. W. Dill in New York; he was the manager of the office, and I was the assistant manager. From having seen him write, I would recognize his signature. As far as I know, from May 1, 1907, to April 1, 1908, Mr. Dill was manager of the American Naval Stores Company branch office at New York. I took employment with the Naval Stores Export Co. in April, 1905, and remained with it until it was put out of business on the 9th or 10th of December, 1905, it having begun actual operations June 1, 1905. After that I have been connected with the Patterson Export Co., which was a small stock company, with \$70,000 capital, of which I was secretary and treasurer. It commenced operations January 1, 1906, and I remained with it until it liquidated in February of this year. It was unable to continue business, and has to dispose of its stocks and pay its debts. In connection with this particular prosecution, I was commissioned by the Department of Justice to make a trip to Europe last November. I spent just thirty days on the trip, for the purpose of securing what evidence was obtainable in Hamburg and elsewhere in connection with the defendants. On April 12th, I received my commission as special agent to assist the District Attorneys, and have engaged in that work since. There is no other man connected with the prosecution, or with the Department of Justice, or assisting the District Attorney's office, who is so expert on this line as I am. Mr. Hoyt has had some experience; he has been at it quite a short period, less than a year, I should say. As to the technique of the business, I myself have principally been advising the District Attorney's office. I have no personal feelings against any one. I am simply contributing in my humble way to the restoration of normal conditions. The matters of stock on hand, receipts, shipments, market conditions, and things of that kind were matters of observation and knowledge on my part, by keeping in touch with the situation from day to day; any one interested in the business would naturally keep in touch with that part of it, and be in position to make sales, or visit the trade, or anything like that. My connection with the Naval Stores Export Company ceased absolutely in December, 1905; it continued as an organization thereafter, but remained inactive. It was not a selling or distributing company; so far as I know, it never made any offers. I did not meet it in competition with the Patterson Export Company. The original Export Company was a company of approximately \$1,000,000 capital. More than half, and perhaps less than two-thirds, of the American crop of turpentine is exported, and the remainder distributed domestically. In the United States, in the territory running east of a line struck from Pittsburg to Pensacola, turpentine is marketed principally upon gauged gallons, and west of that line by weight. Turpentine shipped foreign is sold upon the

basis of weight. The American crop of turpentine goes annually into consumption; I do not know of any abnormal stock being carried over into the season of the spring of 1907. I do not regard 60,000 to 70,000 barrels of turpentine as excessive stock on hand for the market of the world to have at any one time. The demand of the world for turpentine is approximately 1500, perhaps 1700, barrels a day. The naval stores year begins April 1st and runs to April 1st. In a normal year none of the American crop could reach the ports of London and Hamburg, for example, before the latter part of April or the first of May. The American Naval Stores Company is engaged in the naval stores business, in distributing rosin and turpentine everywhere it is used. They buy in the States where naval stores are produced, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Texas, and they sell in Massachusetts, Connecticut, Maine, Vermont, Pennsylvania, Maryland, nearly every State in the Union, in all the States where naval stores are consumed.

Q. How about foreign business?

A. The companies that I have been connected with in attempting to compete have met them in all markets. They had yards at St. Louis and three in the vicinity of Cincinnati, at Ludlow, Covington and Livonia and a yard in Brooklyn. In the territory lying between the Alabama river and the Rio Grande, that is, from Texas to Georgia, the American Naval Stores Co. is the largest purchaser of turpentine from the producer and the factorage companies. None of the so-called competitors of the defendant purchase in this territory; Savannah brokers, for example, are not buyers in that territory at all. Savannah receives approximately 200,000 barrels of turpentine on an average a year. If one competitor, under average market conditions, were permitted to raise the grade of rosin one grade, it would be ruinous to competitors, because of the spread maintained between various grades and the thin margin of profit customary in the business; they could not meet the price made by the party who resorted to such tactics. Assuming a spread of 50 cents between N and WG, a price made for WG based on that market would be \$6.25; if a competitor was intending to supply N, he could cut under five or ten cents, and would just simply take the business. The other man could not meet the offer at all. If one or more competitors are permitted to deliver a half or three-fourths of a gallon of turpentine less than was sold, the result upon other competitors would be ruinous, as described in the rosin, although accomplished in a different manner. A gallon of turpentine would be worth, say, 40 cents—it is not worth that to-day, but assume that it is worth 40 cents—the margin of profit is about one cent a gallon. The Naval Stores Export Co. and the Patterson Export Co. had branches offices in Savannah. Savannah is the basic or primary market in the world for naval stores. Pensacola prices are based on Savannah, and Pensacola is known in the trade as a closed port; that is to say, the product is taken under contract or agreement, but there is no trading, no buying, no bidding. As to the basis on which Pensacola's receipts were taken and by whom, in 1907 J. R. Saunders Co. was

operating in Pensacola, and handling their own receipts. The American Naval Stores Co. was taking the receipts of the Consolidated, J. P. Williams Co., or the Williams Company, as it was known, and *and* the Union Naval Stores Co. The Peninsular is located at Jacksonville and Tampa. The prevailing differential between Pensacola and Savannah is one cent on turpentine and ten cents on rosin, 280 standard barrel, under the Savannah market. The signatures to the letters dated August 8, 1907; May 31, 1907; April 9, 1907, and April 29, 1907, from American Naval Stores Co. to Fels & Co., are those of C. W. Dill. The Government came into possession of this
165 correspondence by subpoena duces tecum, addressed to Mr. Collingwood, buyer of the American Naval Stores Company.

Cross-examination.

Those letters that I got out of the third story of 519 Magazine street, New Orleans, I got without subpoena duces tecum; they were orphans; they were in offices rented by the J. R. Saunders Co., and were obtained at my instance. I went from Jacksonville to see Mr. Sowell, of Saunders & Co., at New Orleans, and he told me there was a man named Bates that might be helpful to me at Mobile; I then sent Mr. Sowell to Mobile.

Q. Mr. Sowell returned with Bates?

A. I saw him when he returned. And when he returned, it is true that I told him that certain factors in Jacksonville, Coachman, Toomer, Patterson and others, were interested in obtaining evidence against the American. I did not agree to pay Bates \$200 a month and his expenses; I did not employ him. I was not present at any meeting on the night of the 29th of April, 1908, at Jacksonville, at which Mr. Bates was present, and at which Mr. Patterson, Mr. Toomer and myself were present; I do not recall any such meeting. I saw Bates after Mr. Sowell brought him back to New Orleans, and arranged with him that he should go to Jacksonville. If Mr. Sowell made the statement to me that Bates' price was \$200 a month and his expenses, it left no impression on my mind. When I went back to Jacksonville, I reported to W. F. Coachman, who was the president of the Consolidated Naval Stores Co. at that time, and who was interested in the information that I was able to secure over there. I did not see Bates when I got back to Jacksonville. I went to New Orleans at the instance of W. F. Coachman. I do not know and can not tell you who was associated with him — that movement that induced me to go to New Orleans. Mr. Coachman did not state to me who was interested with him in having me to go to New Orleans. I did not report to a "pool" in Jacksonville; my interviews were with Mr. Coachman personally. I went to New York after I had been to New Orleans. I did not have Mr. Hoyt working for me; I was very willing and very glad to contribute anything I possibly could to Mr. Hoyt's success in making this investigation; but I was there in New York as the manager of our New York branch office. I would not say Hoyt was working under me;
166 I was only helping him all I could. I gave names to Hoyt. When I was in the employ of the S. P. Shetter Co., I made a

list of consumers, but it was not necessary to give Mr. Hoyt any names from that particular list. I made the list before I left there, or was thinking of leaving, for that matter, and when I went into a rival company, I took the list with me, which I did not think unbusinesslike. A. S. Hubbard is a member of the board of directors and, I believe, member of the executive committee of the Consolidated Naval Stores Company. In New Orleans I did see a package of papers wrapped in a piece of brown paper like that you show me, but whether that is the particular paper or not I could not say. I think those letters wrapped in that piece of brown paper were taken out of Mr. Saunders' office by Mr. Vizzard. Mr. Hubbard was interested in getting this information, and was with me in New Orleans. My interest originated when I was asked by Mr. Coachman to make the trip. I don't know who paid Bates' expenses or what salary he was paid, or anything about it. I dropped the matter after I went back to Jacksonville. I do not recall that I discussed with Mr. Bates in New Orleans how much he would be paid because I was not employing him; I simply sent him to Jacksonville, thinking he might find employment there. What kind of employment I am not prepared to say; I did not know at the time myself; I thought he might prove a useful man to some people there on account of his experience; he might be useful in gathering statistics, we will say. I thought he might be useful to Mr. Coachman in gathering statistics, or something like that. The remark "some people" was purely inadvertent, and I will amend that and say Mr. Coachman, who was the only man I knew. Mr. Hubbard was present when I was talking with Mr. Bates. We were talking about the business of the Union Naval Stores Company and generally affairs of the naval stores industry in the western territory.

Q. I say and the prosecution of the American; that was in March or April of 1908; it was for getting up evidence against the American that you saw Bates, wasn't it?

A. I did not regard that in that light, exactly; no, sir. Hoyt drew some money from me several times when he was in New York, and I took a receipt from him, and he came in later on and would take those receipts up by paying me money. That money was money in the office there, just like I would be making a loan to you. I do not know where Hoyt got the money with which he paid it back; my impression is that he got money from J. H. Burrows, but I do not know that to be a fact; I never saw it at all. I went alone to

Washington to see Mr. Bonaparte to get my commission as
167 special agent. Since the severance of my connection with the Patterson Export Company, I have not been engaged in any business until the 12th of April. Mr. J. H. Burrows was president of the Southern Warehouse Company, which was originally owned by the Naval Stores Export Company, of which Mr. Toomer, and formerly Mr. Coachman, was president. While I was secretary and treasurer of the Patterson Export Company, I was commissioned by the Government to get up evidence as a special agent. While the J. R. Saunders Co. sold actively in competition with the American at Pensacola, it still remains a closed port. I remember very well that

on or about June 11, the Patterson Export Co. shipped a cargo of rosin by the British bark "Egremont Castle." I am not aware that in that cargo that we thus shipped there were certain barrels of rosin that were raised from F to G; I am aware that the grade marks were erased from some of the barrels, and I am also aware that some higher grades were substituted for lower ones, and, to the best of my recollection now, we tried to equalize what we were short on G by putting in I for H and some F for G, so as to make a good delivery. I do not know that F was erased and G put on it; it was not done under any instructions. Our company sent over to Europe to demonstrate that we had made a good delivery, by sending an inspector there for that purpose. It did not come to my knowledge that there had been a change from F to G. This came to my knowledge, that the F was erased, but no other grade mark substituted. The F was erased; so was I erased on I that we substituted for H, and the object of that was, we did not want any question raised as to the delivery; but there was a question raised, and our drafts were turned down. C. H. Barnes, John A. Ewing, E. C. Patterson and myself were directors of the Patterson Export Company; Mr. Toomer was a stockholder and director the first year. In the work that Mr. Hoyt did he did not report to me from time to time; we only conferred; I was not reporting information gotten from Hoyt to anybody; I was attending to my own affairs in New York at that time. I was lending whatever assistance I could to Mr. Hoyt in this matter. I do not recall the exact language of what I said to Mr. Sowell why I wanted this information through Bates; the substance was that I was over there looking into these affairs, and somebody had to get together the evidence, and I was willing to volunteer—that was the idea—I was willing to volunteer my services to help in this case, and I have always felt willing to be. In my humble way, I have contributed what I could to the restoration of normal conditions

168 in this industry. The restoration of normal conditions in this industry was not to get rid of the American—Oh, no, no; that is not how we proposed to answer it; all we ask is fair play. The substance of what I said was this, as I have just explained, I went over there for the purpose of getting whatever information I could that might be available for this purpose. I do not recall mentioning the names of Mr. Coachman, Mr. Toomer and a pool of friendly factors; I will not deny nor affirm that I did; it is a matter of recollection entirely.

Q. It is a fact that they were interested, and you were helping them and aiding them?

A. No, I do not think that Mr. Toomer was interested at that time; I have already stated that my conferences, my interviews were limited to Mr. Coachman personally.

Q. Didn't you and E. C. Patterson, together with Mr. Toomer, unite in obtaining this information, and in pressing this prosecution?

A. No, sir; everybody was interested. Mr. Patterson was my partner, and doubtless we have discussed this matter; it has been a

matter of frequent discussion and comment and talk all the time; it was a very vital matter.

Q. Do I understand you to say that you were never present at any time in Jacksonville at the gathering of the gentlemen interested in the naval stores business, having for the purpose of that meeting this prosecution against the American Naval Stores Company?

A. I recall that in April, 1908, there was a conference, I believe, one Sunday afternoon. That was in the office of Col. Toomer. Mr. Akerman, I think, called the meeting, called for a consultation, a conference, as I recall it now. I think that was after I got those letters in New Orleans, but the letters were not discussed at that meeting. Those letters were abandoned papers, and they were in the office of J. R. Saunders Co., and they were taken, I am told, by Mr. Sowell; they were taken out afterwards and burned up immediately. I caused these papers to be taken on the assumption that they were abandoned, that anybody had a right to take them.

Redirect examination:

I have none of those papers here, and the Government has never been in possession of any of them, so far as I know; they are not in any wise material to this case, and have nothing to do with it. I think Hoyt was employed for the purpose of gathering statistics. There was no statistical department of the naval stores industry at that time at all; the Government was not engaged
169 in gathering statistics, and there was no way to acquire statistics except through some expert. Correct statistics are of the utmost importance to actual values in this industry, because, without some knowledge of the crop production, stocks on hand, any man would be operating in the dark to a certain extent. I went to New York first, and was there several months before Hoyt came. I was attending to my business there, managing the New York office of the Patterson Export Co. I have stated that I was interested in this investigation. By saying on cross examination that, while it was true that J. R. Saunders Co. was marketing its own receipts at Pensacola, and still that was a closed port, I meant that the J. R. Saunders Co. took their receipts from their producers under similar contracts to other people; that Pensacola was not a market where bidding and buying and selling was done on a board, or anything of that kind. I think Mr. Bates is now out of employment; he is here as a Government witness. In connection with the shipment of rosin by the Patterson Export Co. on the bark "Egremont Castle" already testified to, after the documents had been returned, and the delivery of the cargo refused, we arranged to send an inspector, Mr. J. R. Parker, over there, to demonstrate that we were making a good delivery; our company sent him to Europe. The buyer did decline finally and definitely to take a certain quantity of the rosin—I do not recall how much—and that was afterwards taken and sold to Hamburg, and was inspected there by an inspector, and satisfactorily, as I recall now. There were two bundles of papers that I got in New Orleans, and one bundle was taken back by Mr. Vizzard, who was connected with the New Orleans Naval Stores Company for some years.

Recross-examination:

I know that Mr. Vizzard did recapture one of them. In the shipment of rosin by the "Egremont Castle," I do not think we were compelled to make any difference in the grade good; the rosin was thrown back on our hands, and we took it.

170 W. M. DAVANT, sworn for the Government.

Direct examination:

I live in Savannah, and am cashier of the Merchants National Bank. I know J. F. C. Myers and think I am familiar with his signature from having seen him write his name. I look on what purports to be a letter, dated December 5, 1906, and signed by the S. P. Shotter Company, by J. F. C. Myers, Vice-President, and believe that to be his signature.

JOHN E. REGISTER, sworn for the Government.

Direct examination:

I am Official Inspector of Naval Stores in the State of Georgia, living in Savannah, and discharging my duties, which require the inspection of rosin and turpentine there at the Atlantic Coast Line wharf, the S. A. L. and the Central. I have been in the business about 25 years and have been a licensed inspector for about 16 years. The difference between the grades are different. "M," "N" and "Window-glass" are about the closest together, I think. The difference between "M" and "N" is closer than between "N" and "Window-glass." There is a greater difference between "Window-glass" and "Water-white" than between "N" and "Window-glass." Taking the whole line, I should think that between "I" and "K" would be about the greatest difference. There is a good, liberal difference between "H" and "I," and quite a good difference between "F" and "G." I consider "M" and "N" the nearest together, and "I" and "K" about the farthest part. I think the difference is greater between the "I" and "K" than between the "F" and "G." The types shown me are not the standard types, being made by somebody other than the people who put up the standard types. Mr. C. H. Smith, of New York, is the maker of the standard type. These are not stamped and this is the only reason for my statement that they are not the standard. (Witness examines the set of standard type and indicates each grade, as follows: Water-white, Window-glass, "M," "N," "K," "I," "H," "G," "F," "E," "D," "C," "B," "A.") We determine the classification of a barrel of rosin by the size and color of the sample. The types have to be the same thickness to determine their grade. That sample is a little thicker than this. That being the same thickness, the greatest difference is between the "I" and the "K." As an experienced inspector, "M" and "N" and here the window-glass and the "N" is the nearest together. Ordinarily the "M" and "N" are the nearest together.

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Q. How does the difference between that and the "G" compare with the relative difference between "M" and "N" ordinarily?

A. There is such a slight difference, they are apt to be nearly alike, pretty near the same. I should think that of the two, "M" and "N" are the nearest together.

Cross-examination:

In the grading of rosin it is largely the result of individual judgment of the inspector. The number of grades of rosin that can be gotten out of the same barrel depends on how long the rosin has been made. I can take an "M" barrel that has been made for six months and get a water-white sample out of it; that would be three grades.

Redirect examination:

That happens provided the rosin has been exposed to the air, the head left out.

J. C. LITTLE, sworn for the Government.

Direct examination:

I live in Savannah, and am vice-president of the Consolidated Naval Stores Company, in charge of its business in Savannah, which is the handling of naval stores or factorage business. J. P. Williams and Chestnutt & Oneill, Bullard Powell Company, and several others, are also engaged here in the factorage business. At the present time, when the factorage companies make up their daily receipts, they offer them now as a whole day's receipts, that is, the receipts for the day of all grades. That is the custom with all factors, I understand, and I do not know the contrary custom to exist at all.

Cross-examination:

We can offer to independent buyers, we can ship via rail, or we could sell to purchasers, or do as we please with our own receipts. The control of the Consolidated is in Jacksonville, where the head and bulk of its business are.

172 Redirect examination:

The buyers make sealed bids for what we have to offer. We do not sell to the consumer at all. I do not know that other factors do.

E. C. PATTERSON, recalled for the Government.

Direct examination:

I am now engaged in liquidating the Patterson Export Company, which was engaged in buying and selling naval stores, exporting and domestic business. I was president of the Company and it was in business about three years. Just prior to that time, I was manager of the Foreign Department of the Naval Stores Export Com-

pany, my connection there lasting about six months. Before that, I was owner of the Patterson Export Company, which was not incorporated, doing business as an individual in Savannah. I was in business on the Savannah market from May, 1904, to May, 1905. Before that time, I was, for one year, General Manager of the National Transportation and Terminal Company, one of the defendants in this case. Prior to that time, I was running the Standard Naval Stores Company, of Jacksonville, as secretary and treasurer, and from there I went to the National Transportation and Terminal Company. My business required me to travel to Philadelphia, New York, Boston, and various other points, Buffalo; and in this part of the country, Savannah, Jacksonville and Fernandina. I acquired information of the industry, and particularly the selling department of it, through close touch with it, through long experience with it, through daily correspondence, by wire, by cable, and by mail. We had agents, of course, at many important points, with whom we were in daily touch, both by mail and by wire and by cable. We kept in close touch, particularly with Savannah, with the market, stock, receipts and shipments, as this is considered the primary market of the world. We kept a record of the Savannah market, the Savannah transaction, the daily prices bid; and also at Jacksonville, we kept in as close touch as we could. The Board of Trade receipts at Savannah are published daily. I do not think the receipts at other ports are published. I acquired information as to receipts elsewhere only in a general way—approximately. In a statistical way, it was not possible for us to keep accurate information

173 as to export shipments except so far as Savannah was concerned. We had information in a general way and tried to keep in touch with the important points of the industry. I regard Savannah, Jacksonville and New York, important points in this country. The market and the receipts were important, too. I have not been engaged in any other business of any kind in the last ten years, unless as a side issue and in a small way. I do not recall anything for the moment. During the year 1907, we estimated in a general way about two-thirds of the crop to be exported and about one-third used in domestic consumption. I am unable to say approximately what proportion of the crop was distributed from this port in the year 1907. During the naval stores year, from April 1, 1907, to April 1, 1908, I should say 60 per cent. would be exported abroad from here of the receipts. That would be a little over 100,000 barrels; say 120,000, perhaps. I consider Savannah receipts to that time a little over 200,000. Foreign turpentine is usually sold by weight. The countries of Europe buy it by weight. They do not understand gallons abroad. It is sold on the continent of Europe as 52 kilos usually equal to about 112 pounds American weight. In the United Kingdom, it is sold by the English hundred-weight, which is 112 pounds, and represents approximate- 16 gallons, figured on a basis of seven pounds, although a gallon weighs seven pounds and a fraction, almost a quarter. Turpentine is sold usually by weight west of a line from Pensacola to Pittsburg, seven pounds to the gallon, I think, is the basis; while east of Pittsburg, on the

Atlantic seaboard and in that section, it is sold by the gallon. There may be some small exceptions. The coast-wise points of shipments of Jacksonville's receipts are principally New York and Boston. Tampa has a steamship connection, I think, to the north; I do not know to what point those shipments go domestic. Savannah has distributing facilities to practically everywhere. A closed port is supposed to mean where the receipts are not offered to all buyers; where they are taken, they are usually taken by one buyer under contract on some basis, the basis of the Savannah market. Some places, there is a differential of some cents, say ten cents, on 280 pounds of rosin, and one-half cent a gallon on spirits under the Savannah market. Brunswick, I understand, is a closed port. Tampa, Pensacola, Mobile, I am not sure about Mobile; there are some independent people there; Gulfport and New Orleans, I am not sure about New Orleans. Fernandina receipts are usually offered at Jacksonville along with the Jacksonville receipts to the highest bidder. It is hard to say what the differential does represent. I think it is arbitrary. My recollection is that in 1907 the differential between the receipts at the port of Pensacola and the receipts at the port of Jacksonville was ten cents per 280 [pounds] on rosin, although I am not in the factorage business. It was $\frac{1}{2}$ cent a gallon on turpentine. Practically all the receipts from Tampa went to the American Naval Stores Company, I understand. At the time I was manager, the yards of the National Transportation and Terminal Company, one of these defendants, were located at Jacksonville, Fernandina and Pensacola. From May 1, 1907, to May 1, 1908, the American Naval Stores Company was engaged in buying and selling rosin and turpentine, shipping practically to all points where there was a demand; nearly all States, chiefly in the northern States. The consumption of naval stores is practically nothing in the two largest naval stores producing States, Georgia and Florida. It is shipped to the northern States of this country and exported abroad. The largest point of receipts and distribution abroad are London, Hamburg, Rotterdam, Genoa and Trieste. Liverpool is also quite large. During 1907 and 1906, the demand of the consumer took practically all of the receipts of the product except, in my opinion, the narrow margin which had to be carried between the consumer and the producer. That margin, I have estimated, normally, to be from 50,000 to 100,000 barrels of turpentine and 250,000 to 300,000 barrels of rosin. It is necessary in all commodities that are dealt in that the wholesaler or distributor should carry stock. That is particularly true of the naval stores industry, because there is a current demand that has to be supplied and it cannot be supplied in January as well as July, because of the curtailed production in January. The great producing months are from May until October, usually, and the non-producing months from November until the beginning of the new season, April. In 1907, the normal demand of the trade per week was approximately 100,000 barrels. The stocks carried over from one season into another are usually at the principal ports of receipts in this country—Savannah, Jacksonville, Port Tampa, Fernandina, Pensacola, and

abroad in London, Hamburg, Rotterdam and Trieste. During the conditions of normal production and normal markets, if one competitor is permitted to or does mark rosin at a grade above its real grade, the effect upon others is that they would not be able to sell their stuff and therefore would not be able to buy in the market. The effect of that upon the Savannah market would be that it would sag, unless there were other buyers. As an illustration, I was going to say that if a consumer should ask us to name a price on 175 500 barrels of a certain grade of rosin, we might say, for instance, "G," I would have to name a price based on the Savannah market, usually with a small profit added. If the competitor should intend to supply a lower grade and should also be asked to make a bid, he would probably bid lower than mine, and he would probably get the order, so I would fail altogether; I would not be able to sell. The effect upon the business of competitors in the producing and distribution of turpentine, if one competitor were permitted to deliver from a half-gallon to a gallon less than he contracted to deliver, would be exactly the same as in rosin, for the reason that the competitor is intending to supply goods half a gallon short, and could make his profit on the half-gallon. 1907 was a season of great decline. When the season started in, turpentine was about sixty cents and went down to forty, the decline beginning quite early in the season—in April. It was still down in May, June, July and August, according to the best of my recollection. There may have been some slight recovery during that time. It was still down in September, and in October a financial crisis occurred. The decline I speak of preceded that. Within my knowledge, from May 1, 1907, to April 1, 1908, none of the competitors of the American Naval Stores Company had private yards for the storage of turpentine in bulk. I and my associates did our business on the public yards, the railroad yards at Jacksonville. We made some purchases on the yards of the National Transportation and Terminal Company at Jacksonville, but all of our business was done, of course, on the public yards in Savannah and Jacksonville, except the purchase I spoke of, and the public yard in New York.

Cross-examination:

The Standard Oil Company was a large buyer of naval stores on the Gulf. I have heard that they were. The Saunders Company, Central Commercial Company, Terrell Lowenstein Company, Fernwood Lumber Company, the Brooks Scalton Company, W. T. Daley, Jones & Pickett, Jackson Lumber Company, and others were all buyers; I have heard that they were. I knew that as a business man in the trade, in a small way. The differential on such goods as are sold for export means nothing more than that the freight rate from the gulf port, ocean freight, is higher than the ocean freight from the Atlantic seaboard. The whole middle West as consumer practically depends upon the receipts in that section, and I think most of the stuff received there is shipped to the interior. There

176 is some foreign exporting from Pensacola. The freight rate from Pensacola to Louisville may be higher than from Savannah to Louisville, but I do not think it would be to Chicago. I think perhaps it may have been the original intention that the differential was simply the difference between freight rates, whether it be domestic freight or ocean freight or foreign freight. I am not sure that it is simply the difference between freight rates, whether it be domestic freight, or ocean freight, or foreign freight. I say it might be so applied on export shipments. The Patterson Export Co. was engaged in the selling of naval stores, with office in Jacksonville, Savannah and New York, with agents in the principal cities of Europe and in the cities of the United States. We were engaged in an active competition with the American Naval Stores Company. The Patterson Export Company did ship by the British bark "Egremont Castle" a cargo of naval stores. In that shipment, complaint came to us that those naval stores which we had shipped did not in some instances come up to grade. It was not thrown on our hands exactly, but our draft was held up; I think we took five hundred barrels of it back. I was not aware of the fact that the "G," which is the grade letter on some of that cargo, was marked over by the letter "F."

Q. You know that was the complaint, and you know that nine hundred barrels were turned back to you on that account?

A. Yes; I don't know of any marks being changed. Lumber declined in 1907; I heard so; naval stores declined. I know that Mr. J. F. Martin went with Mr. Hubbard to New Orleans in 1908. At my instance, he went over there to see some gentlemen from Texas. When he returned, I saw him, of course. I don't think any one was with me when I saw him upon his return. We had offices together; he came into my office. I met Mr. Bates casually only. I did not contribute to the payment of the money that was paid to Mr. Bates, either directly or indirectly, at any time and to any amount. I did not know Mr. Martin went to New Orleans to obtain evidence against the American. The only time Mr. Martin went to New Orleans with my knowledge and consent was a trip he made over there to meet some operators from Texas, and I think he went down to Beaumont at that time. It is not true that in January, 1908, certain gentlemen got together and the result of that meeting was that Mr. Martin went to New Orleans. I took no part in any of those proceedings. The only thing that I know about Mr. Martin's trip to New Orleans was that he came into the office one day and told me that he had to make the trip to New Orleans. I took no part in the employment 177 of Mr. Hoyt. I did not know that he was employed by some of us gentlemen. I took it for granted that Mr. Hoyt was in the Government employ. I don't know that Mr. Martin, Mr. Cooper, Mr. Toomer, Mr. Coachman and I ever met together for the particular purpose of discussing the affairs of the American, but at such a meeting we did naturally discuss it.

Q. You had a meeting, you were present at a meeting in Mr. Barnes' office, where the affairs of the American were discussed?

A. Well, I have been present at a good many informal gather-

ings. At these gatherings, Mr. Barnes and Mr. Ewing very often, Mr. Martin and myself were generally present. I do not think I ever met Mr. A. S. Hubbard there; never met Mr. Coachman in Mr. Barnes' office. I have met Mr. Toomer. No part that I may have played was inspired by any meeting or gathering. I cannot think at this moment of any part that I was to play in regard to this proceeding against the American. The only part that I took in it up to the time of the indictment was this conference with Mr. Akerman, the object of which was to furnish him some information. I was asked to give him information by Mr. Akerman, whom I saw in Savannah, where I came to see him at the request of Mr. Toomer.

Q. Don't you know that the whole purpose of yourself, Mr. Martin, Mr. Coachman, and Mr. Toomer was to proceed against the American, so as to get rid of it as a rival in business? Wasn't that the purpose of it?

A. Conditions were intolerable, so far as competition was concerned, and I was perfectly willing to come up here to discuss the matter with Mr. Akerman to see if anything could be done to stop it. The idea was not at all to get rid of the American, that was our competitor, without reference to its methods at all. The purpose was to try to stop their methods of unfair competition. I conferred with Mr. Coachman about that, and incidentally with Mr. Hubbard on the street. I talked to Mr. Martin about it every day; to Mr. McMillan and to Mr. Barnes.

Redirect examination:

I have no recollection of any particular conference. I only know that whenever we happened to meet together we naturally discussed the naval stores situation. I certainly do feel now an interest in the correction of the methods of the American Naval Stores Company.

I came to Savannah to see Mr. Akerman, I think in February, 1908. My recollection is that he, Mr. Toomer and I were the only parties present at that conference. I was witness before the grand jury in April, 1908. No competition exists between the Consolidated Naval Stores Company and the American, or the Patterson Export Company. The Consolidated are factors. They do not ship, they do not export. In reference to this cargo of rosin on the "Egremont," we sent an inspector over there and the buyer agreed to hold all of the cargo there until the arrival of our inspector, because we had to fill up that shipment; we were short on "G" and "H" rosin and we had to fill up chiefly with "I," "I" is higher than "G" and "H," and some little "G," but the buyer did not keep his agreement. When our inspector arrived on the other side, he had nothing left but some certain marks that he had held out. The adjustment I have described is what went with the transaction.

I have not completed liquidating the Patterson Export Company, but it has not done any business of any kind since about the 18th of February. I was just undertaking to do a small brokerage business when I was called to Savannah.

Counsel for the Government read in evidence letters of April 9, 1907; April 29, 1907; May 31, 1907, and August 8, 1907, from the American Naval Stores Company to Fels & Co., Philadelphia.

T. F. JOHNSON, sworn for the Government.

Direct examination:

I have seen Mr. Nash's signature twice that I remember of, once to a bond that I hold in my hand. I saw him write the signature. I feel that I would recognize it if I saw it. I look on a letter dated December 5, 1906, and I should say that was his signature by comparison with this.

Counsel for the Government tendered letter purporting to have been written on December 5, 1906, to the Consolidated Naval Stores Company, by the S. P. Shotter Co., by its Vice-President, J. F. C. Myers, and a letter purporting to have been written on December 5, 1906, by the Patterson-Downing Co., by its President, E. S. Nash, to the Consolidated Naval Stores Company.

179 JOHN E. REGISTER, recalled for the Government.

Direct examination:

In reference to my statement that if a barrel of rosin were exposed for six months with the head out, you might get a WW sample out of an M barrel, the idea is that the rosin will bleach if exposed to the air. If you get a sample, as required by the rules of the Savannah Board of Trade, six inches deep, that would give the true grade of the barrel; it would hardly bleach six inches down. If I got it six months afterwards six inches below the surface, it would not grade WW.

DAN WILSON, sworn for the Government.

Direct examination:

From May 1st to the end of the year I was employed in Jacksonville, in the naval stores, working in the shed, repairing old barrels and working turpentine out in Mr. Shotter's yards at the National Transportation & Terminal Co., located southwest of Jacksonville. I know Mr. Moller. I worked both rosin and turpentine. Now and then Mr. Moller would come there about twice a week, sometimes, out to the rosin yard. He was in the spirits shed now and then. When barrels of turpentine came in from the producers, and after they had been inspected by the State Inspector, we called what we did regulate 'em. We took some out of the barrel, out of all of them, about half a gallon, when we got them. When they were going out we would not do anything more to the barrels. The spirits that we took out of the barrels we put in another barrel. That continued as long as I was there. Mr. Mike Wood was there when that was being done; he was the boss of the yards. William Hoskins was there.

Cross-examination :

In the matter of packing spirits, the rule was that half a gallon would be taken out. That is not the rule, but that is what they told me. I know what they call packing spirits of turpentine; the rule was to take out a gallon.

Q. Now, if the barrel was not full enough, more spirits would be put into the barrel? Suppose a barrel of turpentine had leaked?

A. You put more into it.

180 HENRY S. TURNER, sworn for the Government.

Direct examination :

I live in New York; in the naval stores business, in connection with E. M. Sargent Company. I know very well Mr. J. H. Wagner, of the John A. Casey Co. I got a telephone message from the office of Jas. A. Casey Co. one afternoon to come down there if I could spare the time. There were seventeen barrels of turpentine on the sidewalk, the gross gauges of which had been marked by Mr. Wagner's attention. He called to my attention, describing the gauges put on in the South, also his gauges, and he asked me to examine and go over with his man the gauges on the tops of the barrels, which I did. The result was that the gross gauge of the barrels as gauged by his man showed the same gauge on the barrels as that put on in the South by the Southern inspector, and the fresh gauges cut in New York were a gallon and a half or two gallons in excess of the other gauges. The gross gauge of the barrels was incorrect, which meant that there was a gallon and a half or two gallons in the barrels — than the gauge indicated. I know the defendant, Mr. S. P. Shotter. Prior to my going to New York, I had asked a position in Mr. Shotter's employ or in the employ of the American Naval Stores Company. Mr. Shotter was in New York on the 5th of March, 1907, or rather, that afternoon, at the office in which I was engaged, the Patterson Export Company, there was a call left for me to call up the American Naval Stores Company, and also a little memorandum by one of the boys in the office that Mr. Shotter wanted to see me that afternoon at six o'clock up at the St. Regis Hotel. I went up and saw him. In the general conversation, Mr. Shotter asked me if I wanted to go to New Orleans, that he thought it possible that he could give me a position with the South Atlantic Steamship Company. He had some conversation with me in regard to the Patterson Export Company. He spoke very highly of Mr. Patterson, and said that he considered him a good, bright business man, but the nature of the naval stores business was such that it required enormous capital to carry it on successfully, and very expensive organization, and that he did not think that the Patterson Export Company would be in business very long.

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J. W. AUSTIN, sworn for the Government.

Direct examination:

From May 1st, 1907, to April, 1908, I lived in Detroit, Mich., and was engaged in the paint and varnish business and connected with the Acme White Lead and Color Works, being purchasing agent. We used both rosin and turpentine. During the year 1907, we used a total of approximately 2200 barrels of rosin of grades B, M and WW. We dealt with the Cincinnati office of the seller. We purchased that rosin from the American Naval Stores Company. We found more or less discrepancies between the deliveries and the type samples, which we kept on file in our laboratory for comparison with deliveries. I saw such barrels as were complained of by our varnish superintendent, he being the one that came in contact with the rosin. There were different characters which looked wrong, principally, I think, in the gauge of the barrels; apparently scraped or chiseled or marks having been rubbed out with a brush in some manner, and then the brands which we had ordered were put on the barrels, or were on the barrels. I would say that our requirements were approximately from three to four cars per month, and that from May, 1907, to April, 1908, I was called to decide whether or not shipments would be accepted or not on an average of at least once or twice a month.

Cross-examination:

In regard to rosin not coming up to grade, I would determine it by certain type. The type were made by a New York [firm], but unfortunately I cannot remember the whole name. We invariably have a box of types on hand, which we get from New York. During the year 1907, there was no change in the standard types, we used the same types during that year. When my attention was called to a question as to whether a barrel of rosin came up to grade or not, I would determine whether I thought it did or did not come up to the grade by comparing it with these types. So far as the outside of the barrels was concerned, some of them had the appearance of a letter taken off and another letter put on. The number thus defaced varied somewhat; it is a hard question to answer intelligently. Some cars were not complained of and presumably were right. Other cars had a considerable quantity in them. I cannot swear positively how many of the 2200 barrels were different or apparently different in grade from what I ordered. I know that it was a matter of considerable frequency that our superintendent would ask me to see the rosin that had been delivered, and we made claims from time to time for some reclamations, consisting of from some two or three to possibly a dozen barrels. I did not always make complaint when two or three barrels out of a carload of eighty did not apparently grade up to the sample or the type; if I thought there was some chance of getting it, I made it. I did make complaints, but cannot say how many I complained of; I know there was some.

Redirect examination:

We used a set of type approximately a year, keeping them in a darkened box; nobody else but our company used those types; we used them every time a car came in. We got that type from Bealing, Nemeier & Wessels. I did not mean to say that the grade marks we had ordered were taken off; I intended to say that the grade marks ordered were on, had been put on. Apparently some other marks had been taken off from the barrel. The barrels that had been defaced were invariably worse. It was a constant performance throughout 1907.

E. R. MIDDLETON, sworn for the Government.

Direct examination:

In March, 1907, I lived in Savannah and was a naval stores broker. I knew there was such a firm as the American Naval Stores Co. here. There was a buyer for them in this market, I think Mr. Bruen. I was making purchases for any one who would send me an order, but principally for H. B. Bartels, of Hamburg, Germany. I know very well Mr. Shotter, one of the defendants in this case. I bought for the American Naval Stores Co., I think it was about one hundred barrels of turpentine on one occasion, and about one hundred barrels of turpentine on another occasion. I bought it in my own name. Mr. Shotter asked me to do it for him; there was no explanation of why he wanted it done that way. Mr. Shotter asked me if I wanted to make \$25.00, and I told him I did, and he told me to go in the market and buy all the turpentine I could buy at, I think it was, 74 or 74½ cents for my account; it was charged to me. I endorsed the orders over to Mr. Shotter's company.

183 Mr. Shotter gave me a check, which I deposited, and checked against it. The first time he asked me to buy as many barrels as I could in my own name, I bought 100 barrels. He told me to come the next day and see him. I came the next day and he told me to go buy as many as I could at some price. This was on the Savannah market. The second time I succeeded in getting about one hundred barrels. The prevailing brokerage or commission at that time was 15 cents a barrel, or \$15 a hundred barrels. I was paid \$25.00 each time.

Cross-examination:

I was a buyer of naval stores in this market, and would have bought for you or anybody else that gave me an order. The 200 barrels were bought by Mr. Shotter's orders; I do not know whether they were to go abroad.

W. F. COACHMAN, sworn for the Government.

Direct examination:

I am the president of the Consolidated Naval Stores Company, and became such January 14, 1908. In the early part of February, 1908, I visited New York on business for the Consolidated. I know

the defendant, Geo. M. Boardman. I met and had a conference with him in New York. There were a number of matters discussed touching the naval stores industry. I was accompanied on the trip by Mr. Barnett of Jacksonville; he suggested that as we both knew Mr. Boardman it would be well to call and see him. We also tried to see Mr. Cocker Myers, one of the defendants, at the same time in New York, but it seems that he left just before we reached there. The meeting was at Mr. Boardman's office, from where we adjourned later to lunch. One of the things that I mentioned to Mr. Boardman was the clause in the contract of the Consolidated with reference to storage charges. The contract shown me is the one containing the clause to which I referred. I took the position with Mr. Boardman that it was not fair to make us pay the charges on stuff that did not go on their yard. I stated to him that I objected to the charges, and that I did not believe that our company would continue to pay them. That was, I think, about all in connection with that subject that was taken up with Mr. Boardman. We then discussed with him a plan that Mr. Barnes had presented to me with reference to getting the American Naval Stores Company to handle naval stores in connection with the factors on a commission basis. We discussed that matter with him, and he took the position that he would not be willing to conduct the business along those lines, or to change his methods. He stated that theirs was a large organization, and it required a great deal of capital to do their business, that anything in the commission line would not appeal to them for that reason that it was necessary for them to speculate on the markets in order to meet their heavy expenses, and therefore he should be opposed to the plan. One of the other things that I took up with Mr. Boardman was with reference to the sale of a lot of turpentine, something like 9000 barrels, which I think was all stored in Fernandina, that was being carried by the Consolidated for the Naval Stores Export Company. I told Mr. Boardman that I would like to dispose of the turpentine at a fair price, and wanted to know if he would not make a bid. Mr. Boardman said that they would like to have the turpentine, that if it was in their possession, if the accumulated turpentine was in their possession, it would enable them to advance the price of turpentine, and make better contracts or for better prices for the next summer; but that the Naval Stores Export Company was a competitor of theirs; that early in the season of 1907 they had undertaken to sell the market of turpentine short, and that the Naval Stores Export Co. had come into the market and sustained it by the purchase of turpentine, that later on when the Naval Stores Export Co. had all their capital invested, I think probably as he termed it "when they were all in," that they sold heavily short, and either said or gave—and said that they had sold heavily short of turpentine, and the panic came on and played into their hands and they would have been very foolish not to have taken advantage of it. I don't remember any discussion with reference to the other tank spirits in the hands of the producers save that he spoke of the turpentine accumulations. He did say with reference to the Naval Stores Ex-

port Co. being a competitor of theirs that while they would like to have the turpentine, that they would not pay a price that would leave that company, the Naval Stores Export Co., any money in their business. I know the defendant Carl Moller. We were called on to pay the storage charges; I invited Mr. Moller to my office and stated to him that our company—the matter had been as I remember it before our executive committee, it had objected to paying the charges, that while we were living up to the contract
185 in good faith so far as it related to any naval stores that were physically within reach of their yard, that we did not feel that we should be called upon to pay storage to them on naval stores that could not reach their yard by reason of coming by the water, that it was paying them something for nothing, there was no service performed for it, it was not fair to their competitors, and asked him if he would take the matter up with his principals, I think, I said with Mr. Nash, to see if he would not waive the charge. In the conversation on the subject with Mr. Moller it developed that the charges had been paid previous to my going into office under a boycott. That was the language used in discussing it in connection with Mr. Moller, possibly by me. That the American Naval Stores Company refused to bid on the receipts of the Consolidated Naval Stores Company, or, if they did, they underbid what they bid to others, and underbid them in Savannah, to force—

In response to remark by the Court the witness said: If the word concurred in by him covers it then it was concurred in by him, because he confirmed it.

That that was what had caused the payments to be made before I went into office I asked him to take it up with Mr. Nash and see if they would not waive it for the reasons that I have stated. He came back in a few days and said that they demanded the payment of the storage charges. I said, "Mr. Moller, does that mean if they are not paid, that we are going to be boycotted again?" He says we expect you to pay the storage charges. I paid them, and have continued to pay them since.

Cross-examination:

I think Mr. Burrows is president of the Southern Warehouse Company, and my impression is that that was owned by the Naval Stores Export Company. The Consolidated Naval Stores Co. up to August, 1908, held some of the turpentine and warehouse collateral of the Naval Stores Export Co. My recollection is that the Consolidated held 7900 barrels. The Naval Stores Co. turned over its entire assets of turpentine and its stock in the warehouses to the Consolidated and the Florida National Bank in liquidation of its debts, and there was no price stated for the turpentine. If there was a price named, I don't remember it. The transaction was not made by me, it was made by one of my vice presidents. If there was a price fixed on the turpentine I am not aware of it. Mr. J. F. Martin went to New Orleans with Mr. A. S. Hubbard, who is a son-in-law of Mr.
186 Taliaferro, and a member of the executive committee of the Consolidated. I know Mr. Bates. Mr. Bates was in my

employ, but I cannot remember the date of his employment. I remember a conference with Mr. Bates when he came to Jacksonville from Mobile, but whether it was October, 1908, I am not clear. Just after conferring with me, it is not a fact that I then consulted Mr. Toomer about his case; I have no recollection of it; I do not think it is true. Mr. Hoyt has never been in my service, and I never saw him until I came to Savannah a few days ago. I certainly do mean to say that Mr. Hoyt was not with me in Jacksonville on Saturday, October 8th. I did not confer with Mr. Hoyt at any time, directly or indirectly. I do know that Mr. Hoyt was employed in getting up information in behalf of certain gentlemen in Jacksonville against this defendant company. It is not a fact that payment was made either by my company the Consolidated or through it to Mr. Hoyt. As you want my impression, I think the payment was made by a number of prominent Florida operators, or Georgia operators, of operators, a number, prominent in the service who were called upon to make a fund for the payment of Mr. Hoyt's salary until such time that he should be employed by the Government, if he was employed by the Government. Mr. Martin did not confer with me from time to time about this prosecution; never reported to me at all. I attended one conference, having reference to this prosecution against the American Naval Stores Company, being a conference at Col. Toomer's office, which Mr. Akerman had requested, on Sunday afternoon, some time early in April, 1908, I think. There were present Mr. Akerman, Col. Toomer, Mr. Martin, Mr. Patterson, I am not sure whether Mr. Barnes was or not. Mr. Martin and Mr. Hubbard reported the result of their trip to New Orleans to me. I saw some letters, but I am quite sure that there were none alleged to have been written by the American Naval Stores Company, and said to have been taken out of the third story of a store on Magazine street in New Orleans. Possibly I say letters from the Union Company, or they may have been S. P. Shotter. When I first saw them those letters were in the hands, as I remember it, of the express agent, and I think they were delivered to me. None of those letters did I turn over to Senator Taliaferro. I am aware of the fact that at least one of them got into his hands, and he used it in Congress. I was in Savannah at the time of this indictment, April 11. I don't remember that I called on Mr. J. A. G. Caron at his office in this city, I may have done so; I think it is very likely; I generally call on him when I am in the city. I did not on that day express my regret at the action of the grand jury, and my sympathy and respect for these defendants, to Mr. J. A. G. Carson, April 11, 1908, and did not at the same time request Mr. Carson to bear that message from me to them. On this recent trip I sent a card to Mr. Boardman's room, and was told that he was in 410, and tried to reach him and didn't hear from him. I had the impression until the meeting in New York with Mr. Boardman that he had very little to do with conducting the naval stores business. I knew that neither Mr. Nash nor Mr. Shotter was here; they were both in Europe, otherwise I would not have tried to see Mr. Myers

and Mr. Boardman. I went to see Mr. Boardman knowing that both Mr. Nash and Mr. Shotter were in Europe; I had been so advised by their office, and went to see Mr. Boardman about the matters of which I have told you; tried to see Mr. Myers at the same time and failed. Those were the representatives of the company that were on this side of the water. I do object to those charges now.

Q. Have you any objection on the part of your company to canceling that contract right now if it is objectionable; yes, or no?

A. I am speaking of that clause of the contract.

Q. I am speaking of the contract?

A. As a whole?

Q. The whole contract?

A. I would not commit myself on that without consulting the executive committee.

I want to make a statement with reference to the defendants. These are gentlemen that I have done business with for a good many years, and I have classed some of them, if not all of them, as my friends.

Redirect examination:

There was a statement I wished to make. I have no personal feeling against any of the defendants. In the conversation with Mr. Boardman it developed or impressed me that he knew much more about the naval stores business than I supposed he did, as to their selling short, and how the markets had been effected.

At the time of the conversation asked about with Mr. Carson I was in Savannah having been summoned before the grand jury. I would not have come except under the subpoena of this Court. I cannot recall the conference alleged to have been had with Mr.

188 Carson at all. I said it may have occurred; before the conversation was repeated I have no recollection of such a conversation. I have known Mr. Boardman, I should think, for ten years. I am stopping at the De Soto Hotel, and *and* was advised he was stopping there also. I heard that he was in the hotel, and sent my card to him. I did not see him. I saw him in the courtroom the first day of the trial, but have not had the pleasure of speaking to him.

The conference I referred to was held in Mr. Toomer's office at the request of Mr. Akerman, the district attorney. Visits from Mr. Toomer preceded that conference, visits upon this subject; I think that was about a year before, and had no relation to this prosecution whatever. My understanding is that the stock of the Southern Warehouse Co. was owned by the Naval Stores Export Co., and the turpentine bought by the Naval Stores Export Company in 1907, became and is the property now partly of the Consolidated Naval Stores Company, and of the Florida National Bank; I do not know whether any other bank has any holdings in it. I think the Naval Stores Export Co. has gone entirely out of business.

Recross-examination:

The 10th and 11th paragraphs of that contract were stricken out when the American took it over.

Redirect examination:

The contract as first seen by me is just as you have it now, with the 10th and 11 paragraphs crossed with pencil marks. There is a letter on the subject.

Counsel for Government introduced in evidence contract dated December 7, 1905, between Patterson-Downing Co. and the S. P. Shotton Co. of the one part, and the Consolidated Naval Stores Co. of the other.

JOHN H. POWELL, sworn for the Government.

Direct examination:

I am in the naval stores factorage business, and am interested in the producing end, being interested in 15 places, I think. I give my special personal attention to the factorage end of the business.

189 I am associated now with the Bullard-Powell Co., with headquarters in Savannah. I was once one of the vice presidents of the Consolidated Naval Stores Company, and was connected with that company in that capacity in May, 1907. I had the sale of their receipts in Jacksonville at that time. Occasionally the American Naval Stores Company, under this contract or otherwise, bid for that portion of the Consolidated Naval Stores Company's receipts, which came down the St. John's river and were stored on the Atlantic Coast Line naval stores terminals, with the understanding that we transfer them to the yards of the National Transportation & Terminal Co. When we transferred to that yard, we paid the usual storage. We paid the same thing, the usual storage, three cents per barrel on the Coast Line yards. The Consolidated paid the transfer charges; I think it was transferred by the Coast Line Railroad; the transfer was not included in the initial storage charge, but was paid extra. I think the paper handed me must be the contract; I have seen it before. Up to January 1, 1908, the president of the Consolidated Naval Stores Co. was Mr. W. C. Powell, who is my first cousin.

Cross-examination:

So far as I know that contract was freely and voluntarily made by our company in the first instance; the service we got on the yard was entirely satisfactory.

Redirect examination:

I do not know anything about the circumstances under which it was made.

THOMAS PURSE, recalled for the Government.

Direct examination:

The market for turpentine on the first and fifteenth of each month from May, 1907, to March, 1908, inclusive, except that if either of

those days be a non-trading day, Sunday or holiday, the market is the next succeeding, is as follows:

On May 1, 1907, turpentine was 63 to 63¼, the tone of the market was firm;

On the 15th, 60 to 61, tone of the market firm;

On June 1st, 58¾, tone firm;

15th, 57 cents, tone of the market firm;

July 1st, 57¼ to 57½, firm;

July 15th, 56¾, firm;

190 August 1st, 55½, firm;

15th, 56¼;

September 1st was Sunday, the 2nd was a holiday, there was no quotation, so for September 3, 53½;

The 15th was Sunday, quotation to be taken the 16th, was 52 to 52¼;

Both the 1st and the 15th were firm;

October 1st, 52¼, firm;

15th, 52½, steady;

November 1st, 49 to 49¼, firm;

43¼ to 45¼ on the 15th, firm;

December 1st was Sunday, quotation was taken for the 2nd, 45¾, firm;

December 15th was Sunday, the 16th was taken, 43¾ to 44; the market of both the first and the 15th were marked steady;

January, 1908, first was Sunday, quotation was taken for the 2nd, 40¼;

On the 15th, 54 cents, market firm on the first and steady on the 15th;

February 1st, 52 cents;

On the 15th, 48 cents; tone of the market for the 1st and the 15th was firm;

March the 1st was Sunday, the quotation of the 2nd, 50 cents;

15th was Sunday, March 16th, 48½; tone of the market on the first was steady, and on the 15th firm.

Cross-examination:

The average for the season of 1907-8 for spirits was 53.49 cents.

Redirect examination:

The average for 1906-7, the year prior, was 64.38.

J. A. G. CARSON, sworn for the Defendants.

Direct examination:

I am president of the J. P. Williams Company, naval stores factors, located in Savannah and Jacksonville. I have been in the business over 25 years. I know Mr. W. F. Coachman very well. On April

11th, 1908, Mr. Coachman called on me in my office. The conversation began with his soliciting some information about the building of roads, and finally he got to automobiles; and a general conversation ensued, and I led up to the question of this

indictment; Mr. Coachman said that he had been so busy with the Florida political situation that he had given no attention to it. I said that I was surprised, I thought he was one of the prime movers. He said he was not, had had nothing to do with it. His sympathies were with the defendants, and he would like them to know it.

I recognize the contract shown me, and the signatures thereto, dated July 15, 1905, purporting to be between the Naval Stores Export Company and the J. P. Williams Company.

This is a contract entered into on the 3d day of April, 1905, between Edward C. Patterson of Savannah, Ga., trading as Patterson Export Co., and J. P. Williams Company.

GEO. M. BOARDMAN, one of the defendants, sworn.

Direct examination:

I am one of the defendants, and live in Brooklyn, N. Y. My principal business is one of the partners in Patterson, Boardman & Co., importers of East India goods in New York City. I am also treasurer of the American Naval Stores Co. of West Virginia, the American Naval Stores Co. of New York, and I am president of a company in New Jersey that manufactures a butter product. My time is almost exclusively in the direction of the Patterson Boardman & Co. business, which has no connection with the American Naval Stores business. That company has never had any connection with the naval stores. The American Naval Stores Company of New York pays my salary; I get no salary or other remuneration from the West Virginia Co. except the dividends on the stock I own in that company, being 668 shares, a little over three per cent. It has \$2,200,000 at \$100 per share, I think that is 22,000 shares. My salary as treasurer of the New York American is \$2500 a year. I have no connection with the National Transportation Company of New Jersey or the New York Company, and never have had. I have no office as treasurer of the American Naval Stores Company. In either of the companies I go to the general offices of the American Naval Stores in New York, but I have no particular place there or location, just my location for the purposes of the treasurer of the company. Sometimes I write letters in my office of the Patterson Boardman Co., and sometimes in the subject matters of
192 finance I go to the office of Mr. Dill in New York, where the American is located. I should say that I go there from two to four times a week. When I go to my lunch, I stop in there from five minutes to half an hour, according to whether there is anything talked about concerning the finances of the company in New York. I am not on any executive committee; I am on the board of directors of both American companies. I attended the meeting of the West Virginia company in Jersey City at the time it was being organized. I attended the meeting of the West Virginia company at Savannah in April, 1907. I never attended any meeting of the stockholders or directors of the West Virginia company except on those two occasions. I have no specific duties as treasurer of those two companies, my duties are primarily to arrange loans and bank-

ing facilities in New York City for the New York Company. I have no duties, specifically or otherwise, in the West Virginia company. I have no connection whatever with the sale or the buying of naval stores; I never bought or sold, or made a price on a barrel of naval stores in my life; never told any one else to. I was positively never a party in any way or at any time to any changes in grades of rosin or anything that is suggested in this indictment on that line. I have had no connection at any time in any way with grading rosin at all. I did not employ Mr. O'Keefe, the witness who testified here. I went to the office of the New York company on a certain date, I do not remember the date, in connection with my duties there as treasurer of the company, and in passing through Mr. Dill's office he stopped me and said that the gentleman sitting there was Mr. O'Keefe, who was there for the purpose of making an application as superintendent of the rosin yards which it was proposed to open in Brooklyn. He introduced me to Mr. O'Keefe as the treasurer of the company. I chatted with him casually for a few minutes, and passed on. I understand Mr. O'Keefe was employed by the National Transportation & Terminal Company of New York. Neither one of the American companies to my knowledge employed him; as treasurer of those companies my attention has never been called to any payment by either to Mr. O'Keefe. I know nothing about the policy of the American Naval Stores Co. of West Virginia, that is the one whose principal office is located here, and the one under indictment. Sometimes my curiosity prompts me to see what they are doing in a casual way, but I know nothing about the way they do their business except very vaguely. I have never hired, or confirmed the employment of, any employé for the West Virginia Company. I have never made any
193 agreement with anybody, or with Mr. Nash, or Mr. Shotter, or Mr. Myers, or Mr. Moller, or Mr. Deloach, or any one of the parties, with reference to restraining trade or getting a monopoly for the American Company or any other company; and never heard of any such agreement or understanding. Mr. Coachman called at my office in the month of February, 1908, I do not recall the exact date, but it was prior to the 7th of February; Mr. Barnett was with him. After the interview had passed, I wrote a letter giving the substance of both interviews, that letter I have now, and it is used for the purpose of bringing more clearly to my mind what occurred at that interview. One of the subjects of the discussion by Mr. Coachman was the contract with the Consolidated Naval Stores Company in which he spoke, I recall, of requiring them to pay storage on naval stores which were not stored with the Terminal Company. I told him I knew nothing about the contract, and had no authority to act with regard to it, and that he would have to see the executive heads of the company in Savannah with regard to it. Subsequently I reported to Savannah what had been said in New York. Mr. Coachman also referred to a plan of selling turpentine on a commission basis instead of on the present basis, and said that he regretted that that plan appeared to be unworkable. The plan had been put to me in the previous November by Mr. Barnett, had been gone into

by him at considerable length in November, and I had at that time written Savannah the particulars of the plan as outlined by Mr. Barnett, and told him that anything that could be done would have to be done with the executive heads in Savannah, that I had no authority or power to do anything about it. The plan that Mr. Coachman referred to when he called on me had been told to me the previous November, and when Mr. Coachman referred to the plan, he said he regretted that it was an unworkable proposition, and I happen to know that between November and the time I saw Mr. Coachman the matter had been discussed in the Savannah office, but to the best of my recollection I did not know, when Mr. Coachman called on me, whether the plan had been turned down, or whether it was still under negotiation. I expressed no disapproval of the plan in terms, on the contrary, I said that there were some features of the scheme which appealed to me as a very good thing for us and for the industry, and the matter passed off. The proposition referred to by Mr. Coachman was something of this kind: It was proposed that the American Naval Stores Company should handle the entire crop of naval stores or as much thereof as they could get operators and producers to contract for, and the American

194 Naval Stores was to receive a commission for the sale of the goods, and that they should make no other profit excepting that commission, and out of that commission they should pay their own administration expenses. It was suggested at the time that the plan would be difficult for the reason that there were independent operators that might not come into the plan, and if the American Naval Stores was to be allowed to handle the entire crop for the purpose of regulating the price on the basis of supply and demand, it would give them great power, and it would require a very nice balance to do the thing fairly. I also stated that I considered a very serious objection to the scheme was the question of a monopoly, that if the company contracted with the factors, even although the contracts were separate, and had nothing to do with each other, the fact might obtain that we had substantially a monopoly in the selling of the goods, and I considered it was a very serious objection, and I would not consider any such proposition without we had taken legal advice, and were absolutely sure that it was not a violation of any law respecting a monopoly. That was the arrangement that Mr. Coachman said he regretted had not been carried out. Mr. Coachman also made reference to the turpentine in Savannah held by the Naval Stores Export Company; I do not recall how much there was of it, but I understand it to be the same turpentine that has been referred to here a number of times, that Mr. Coachman's Company and the bank took over in the liquidation. Mr. Coachman told me that he thought the turpentine ought to be sold, and that it was probable that we would be approached, very soon, perhaps, to see whether we would take it. I told him that I had nothing whatever to do with purchasing turpentine or anything else for the company, and that anything that was done in that regard would have to be done with the men that attended to that part of the business in Savannah; I knew nothing whatever about it, had never

bought any turpentine, had no authority to buy any turpentine. Mr. Coachman also stated, which surprised me considerably, that when the turpentine was sold, which was owned by the company of which Mr. Toomer was president, he thought it would be better for all concerned if the price obtained left no equity for the Naval Stores Export Company. He told me that if they had any money left, they might be able to do some damage to the industry, while if they were wiped out in the turpentine transaction they would not need to be reckoned with in the future. That is almost verbatim from the letter I wrote descriptive to the conversation.

I am positive about all this. That is the same Mr. Coachman who testified.

195 Cross-examination:

I am familiar in a general way with the properties of the New York American Naval Stores Company and of the West Virginia company; I have a statement of their affairs about every quarter. Mr. E. S. Nash, Mr. S. P. Shotter, Mr. J. F. C. Myers, Mr. C. J. De Loach, are respectively president, chairman of the board of directors, vice-president and secretary of the West Virginia Company and the New York company. The offices of the New York company are 21-24 State St., New York; the principal office of the West Virginia company is in Savannah; it has no New York office that I know of; it has no branch office in New York. To the best of my knowledge the American Naval Stores Company of West Virginia owns all the stock of the New York company, even the qualifying shares of the directors. I think I know who is the largest owner of the stock now and who it was in 1907, of the National Transportation & Terminal Company; the situation is this, those records are kept here in Savannah, and whenever changes are made they are done by action of the board of directors, and I have never been to any meeting of the board of directors where any change was made. I think I know, but I could not say positively. The original stock of the National Transportation & Terminal Company at the time of the organization of the American was \$1000, ten shares, that was all the paid-in capital stock of the company, and it is my recollection that was advanced in the proportion of 7 to 4 by the Patterson Downing Company and the S. P. Shotter Company, one got seven parts and the other 4 parts. The S. P. Shotter Company and the Patterson Downing Co. were succeeded by the American Naval Stores Co., which, to the best of my recollection took over all their properties. I know the American Company of West Virginia owns stock in other companies, because there is an item on their statement, just what the particulars are I could not say from positive knowledge. My impression is that the American Naval Stores Company European branch is a branch office of the West Virginia Company, I believe succeeding the Antwerp Company of which Mr. Speth was the head. I don't know that they took over the company, they went into business over there. I think the American owns the bulk of the stock of the American Pine Products Company of Hamburg. The American owns some of the stock of the

Rosin & Turpentine Importing Company which operates in the United Kingdom. The American has relations with the Union Naval Stores Company by virtue of a contract to purchase certain receipts that the Union Company has, and owns some of the stock of the Union Naval Stores Company, but is not the largest stockholder in the Union by a large majority. Its stock is not held by the American through individuals or trustees to my knowledge. Unless there has been a change made in the quantity of stock that is owned by the American Naval Stores Company of West Virginia, it owns about \$120,000 of a million and three-quarters stock in the Union, and no more, directly or indirectly. I understand that Mr. Shotter owns a large part of it, but don't know positively. I am sure that Mr. Nash does not own a large block of stock in it, unless he got it recently. I do not own any of its stock, and have no interest in the company whatever in any way. The Union Naval Stores is located in Mobile or New Orleans, engaged in the factorage business I believe, but not directly a producer of naval stores that I know of; I believe it is interested in some farms to quite an extent; it is not a distributor in the sense that you mean; they sell their products like other factors, selling to the American Naval Stores Company. I have never heard of the Imperial Naval Stores Company. The American Naval Stores Company has a contract with the Peninsular Naval Stores Company for part of its receipts, and also owns some of the stock in the Peninsular, but not sixty per cent. that I know of, unless it has bought some very lately that I have heard nothing about. The Peninsula is engaged in business as a factor, with its principal office in Jacksonville, and my recollection is that it has a branch office in Tampa. I do not know that there is any relation between the Standard Oil Company and the American as to the Pensacola receipts of spirits of turpentine, I am sure that there is not, except that they may sell to them. I know about the organization of the National Transportation and Terminal Company of New York. I am quite sure that the American Naval Stores Company of New York owns that stock. Mr. Spencer P. Shotter is chairman of the board of directors and a member of the executive committee of the American Naval Stores Company of West Virginia; I would not say that he alone is general supervisor and director of the entire policy, as a member of the executive committee, a director. Mr. Nash, Mr. Myers and Mr. Speth are associated with him. Mr. Speth lives in Antwerp. I have always considered Mr. Shotter a man of a great deal of experience in the naval stores business; I suppose I may have known of him in that business ten or fifteen years. I suppose matters of the company of the highest importance are referred to the executive committee, the members of which are Mr. Nash, Mr. Shotter, Mr. Myers and Mr. Speth, and they are together practically all of the time, they are in the same offices, they are right side by side, except Mr. Speth; sometimes they work alone.

Redirect examination:

The New Jersey National Transportation & Terminal Co. started with a capitalization of \$1000, which was afterwards increased to

\$250,000. The Union Naval Stores Company is not directly interested in production that I know of; I understand that it owns stock in producing companies, or is interested in some way in producing companies to quite a large degree; I mean that it is interested in turpentine farms. Unless it has been changed recently, Mr. D. C. Ashley, living at Valdosta, is president of the Peninsular Naval Stores Company; I think Mr. Weibert is the vice-president and manager of the company in the Jacksonville office; and I think Mr. D. W. Blount is a vice-president, living I think in Jacksonville or that neighborhood.

Recross-examination:

I do not recollect the details of the increase of the capital stock of the National Transportation & Terminal Co., to \$250,000; I suppose it was by additional payment of stock. Its authorized capital was \$250,000, of which \$1000 of stock was issued. I think they borrowed a good deal more than \$50,000 from the Patterson Downing Co., and the Shotter Company, I couldn't tell without looking at the record; I don't know positively about that being paid back from the earnings; I do not know whether there was ever any additional capital stock paid in; I had nothing to do with that. I arranged the financiering of the company as far as the three banks in New York are concerned where it has deposit accounts. To the best of my recollection the American is floating the accommodation paper of the Union Naval Stores Company to the extent of maybe a million, and maybe half a million, it is around somewhere in that.

Counsel for defendants tendered in evidence the character of the "American Naval Stores Company of New York," incorporated on the 19th day of November, 1906, and the charter of the "National Transportation & Terminal Company," the charter showing that it was incorporated in New York on the 22nd day of March, 1907.

198 E. R. MIDDLETON, recalled for defendants.

Direct examination:

I wish to correct something about my testimony. I stated that I had been instructed by Mr. Shotter to buy some turpentine for him for which he paid me a commission on two occasions of \$25 each. That is a fact. I stated in referring to that that the time was during March, 1907, which was a mistake on my part as to the time. I had a transaction with Mr. Shotter at that time. The transaction referred to was the transfer of 200 barrels of turpentine sold to Mr. Shotter by Baltimore parties, and I was instructed by the Baltimore parties to make this delivery. I did so and have the records in my pocket of that transaction. My mistake was as to the time. We had two transactions, one in which I bought for him, and the other in which I transferred to him turpentine, which he had bought from my Baltimore friends. I wanted to make that statement in justice to myself and to the case. The correct time is some time previous to October, 1906. It was not the transaction that I thought it

was. The transaction, whatever it was, was with Mr. Shotter personally; the exact time I do not know. The history of the transaction is this: A small boy came into my office and said that Mr. Shotter wanted to see me. I went to Mr. Shotter's office and he asked me if I wanted to make \$25. Of course I did. He told me to go out and buy all the turpentine I could, and I think it was at the market. I do not think it was either above or below the market. I bought some turpentine. When I reported to him my purchase he instructed me to come at the same time tomorrow. I came at the same time, went out and bought some more turpentine for him which made a second fee. I would not swear whether I endorsed the orders to the S. P. Shotter Co. or to the American Naval Stores Company. I think I simply put my name on the back, and the bills and the orders were handed to Mr. Shotter. I got the check for it and paid the bills. The goods were bought in my own name. What is exactly the time I do not remember, but it was before October, 1906. There was only one sale, the January sale, I did not report it on the market, I am quite sure; and I do not know whether it was reported or not.

Cross-examination:

I had the instructions from Mr. Shotter personally and
199 did the buying for him on two days, and I did it in my name. I would not want to say that it was within three years prior to the 11th of April, 1908, I could not swear to that, I have no data upon which to figure, except that it was before October, 1906. Since I was on the stand I have been asked by Mr. Bruen to make a statement in reference to this matter. I saw also Mr. Coney and Mr. De Loach, but Mr. Bruen asked me about it, and I told him I would make the statement. There was a written statement submitted to me for my signature, but I did not sign it, preferring to talk to the jury.

Redirect examination:

I do not know by whom Mr. Bruen is employed. I know where he goes, he goes into the American Naval Stores Company office, and he is possibly—but to ask me to swear positively whether he is in the employ I think it is unjust. Mr. Bruen came to see me, had a record with him, to show me that I had made an error, and I became satisfied that it was an error, and said I would correct it on the stand.

Recross-examination:

I discussed the matter with Mr. Akerman and Mr. Toomer. Mr. Toomer told me that if they gave me any trouble he would give me an opportunity of appearing before the jury.

C. W. DILL, sworn for the Defendants.

Direct examination:

I live in Brooklyn, N. Y. I am the manager of the American Naval Stores Company of New York, and president and general

manager of the National Transportation & Terminal Company of New York. I have no connection whatever with the National Transportation & Terminal Company of New Jersey. I buy a large percentage of my goods from the American Naval Stores Company of West Virginia, whose principal office is in Savannah, and I act as their attorney in financial matters, under power of attorney; but am not an employ   of it in any other way, and receive no salary from it. The yards in Brooklyn in which naval stores are kept are the National Transportation & Terminal Company of New York, and Geo. L. Hammond Co., known as the Union Naval
200 Stores Co., owned and controlled by Geo. L. Hammond Co., two separate and distinct yards. The latter yard does not belong to either of the companies known as the American, for short. That is a public yard where the National Transportation & Terminal Co., keeps its naval stores, and other parties keep naval stores there. I know Mr. O'Keefe, who has testified. He worked for the National Transportation and Terminal Company of New York and was not paid by another company. Mr. Percy Ketchum worked for the National Transportation & Terminal Co., of New York. The workmen under O'Keefe worked for the same parties. As manager of the American Naval Stores Co., of New York, I buy and sell rosin and turpentine, and transact all the business that is to be transacted. Mr. Boardman is treasurer of that company; he does not buy and sell Naval Stores, and has nothing to do with them; I do not consult him in any way about buying or selling. I engage and discharge the help, and have absolute supervision over it. As president of the National Transportation & Terminal Co. I have complete charge of its yards, and control the yards absolutely; no one gives me orders about the yard; I manage it. My company leased that yard from the Beard estate, negotiations beginning with a Mr. Hinman, the manager of the estate, and afterwards the leases were closed by myself as president of the National Transportation & Terminal Co., and Mr. Wm. Beard and Mr. Robinson Beard, I think it was, trustees of the estate of Wm. Beard. Mr. Boardman had no hand in the leasing of the yard at all. I found the yard and located it and made the negotiations and finally closed the lease for it. He was not present when the lease was closed.

Q. What connection, if any, did Mr. Boardman have with the employment of Mr. O'Keefe or any of the workmen under O'Keefe?

A. Mr. Boardman has no connection at all with the yard, or with the help at the yard; in fact I do not think Mr. Boardman ever saw the yard before or since, absolutely nothing to do with it. The only question he ever asked me about the yard was we had a strike, and I was over at the yard for a couple of days myself, and he *was* asked me how I was getting along at the yard. John A. Casey Co., Thos. Seely, M. W. Larenden, Turton & Co., Mr. Gunnerson and Mr. Louis Jennings, stored naval stores on the yard. Mr. Jennings and Mr. Gunnerson's transactions were very small affairs. Thos. Seely was perhaps next to the largest one that stored there, and John A. Casey was the largest outside of the American Naval Stores

201 Co. We usually had from 500 to perhaps two or three, perhaps four or five thousand, I should say, about three or four thousand barrels on the yard that belonged to other people, and nearly always had something there that belonged to someone. Bills were sent out once a month to every one who stored there, and every one was charged the same price according to the schedule that we had, and that included the American Company, which was treated as any other customer of the yard. The New York American bought from the West Virginia or Savannah Company. I bought a great deal of goods from the American of West Virginia, the greater percentage of them; I bought from other people, and I treated those purchases just the same from one as I did from the other; I buy where I can buy the cheapest, of course; but naturally buy the greater part of my stock from the American of West Virginia. These goods are shipped and drawn on at sight, and the transaction is closed so far as the West Virginia Company is concerned. When these goods were shipped north, they were ours, but there is a technical point there just when they were ours. I considered they were ours as soon as they were put on the steamer and the bill of lading signed. The goods ordered from the Savannah American would be paid by sight draft on the American Naval Stores Company of New York against the bill of lading. The Drafts were paid when presented at our office in New York, the American office there. We made no difference whatever in purchases from the American of West Virginia or Savannah, and purchases from other parties. The National Transportation & Terminal Co. of New York paid O'Keefe and Percy Ketchum and the working men under them. Mr. O'Keefe's employment terminated on account of a strike we had at the yards; the workmen went out, and Mr. O'Keefe went with them. Mr. Degroot was a common laborer; he took orders from Mr. O'Keefe and usually worked one end of the gang; we worked them in gangs of about 15, and Mr. O'Keefe would be practically at one end of them, and Degroot the other. I never saw Degroot mark any rosin; and never saw him or any one else take marks off of rosin.

We tried as far as possible to inspect our rosins as it come in from the south, from all points, and after the rosin was inspected the new grade was put on, and then the old grade was taken off. We took it off so as not to create an erroneous idea in the minds of our customers. Sometimes the grade was taken off, and the rosin gained, perhaps, well a greater percentage of it, there was a percentage of it that would lose; the mark was taken off just the same, whether it gained or lost; if it neither gained nor lost, the original mark was left on there. The mark was taken off with a box scraper, I believe they call it. I never saw
202 any other way of taking a mark off. I have been in the business 17 years. This has been done in New York ever since I have been there, which is 12 years. We have no inspection law in New York. Mr. Chas. Smith, who has testified, is the inspector for Geo. L. Hammond & Co., and also does work for us. I think he is supervising inspector for Bealing, Nemeier & Wessels,

They are the supervising inspectors for the Produce Exchange of New York, and we do all of our business in New York under the New York Produce Exchange rules which has been in effect about 54 years, I believe. He is not a state official or a city officer. After Mr. Smith tested the rosin and put his grade marks on the barrel, they were considered final, and were never changed. The trade in New York has always demanded the New York inspection; all goods are sold under New York inspection; sometimes we sell goods under what we call the brown ticket, which is a ten per cent inspection; and it is a very difficult matter to sell goods to any one in the trade in New York where the goods are in the yard, unless you produce that brown ticket, as we term it, it means a ten per cent test of anything that is in the yard. I never did order the marking up of rosin without sampling. My orders were to have everything inspected as far as possible 100 per cent, to inspect everything we could possibly at 10 per cent, and test for weights ten per cent, of everything that came in the yard. Ten per cent at least. We were rather limited for space, and for that reason sometimes it was necessary to inspect only ten per cent. I might explain that, if a ten per cent test showed that the rosin was gaining we would go through it 100 per cent, if it showed that it was losing we would go through it ten per cent, if it showed that it was holding up nicely to the grade, we left it exactly as it was. I mean ten per cent of the total quantity of that particular mark. Everything that comes to New York comes with a shipping mark on the barrel, a distinguishing mark on the barrel, and it comes in lots of 100 barrels, 200 barrels, 50 barrels, it depends very largely where it comes from; from Brunswick it comes in very large quantities; from the interior it comes in very small parcels. When we resampled, all the rosin did not gain a grade, some of it run off grade.

The gain was greater than the loss. When the grade of a rosin runs down, we marked the grade down. When we marked down, the old grade was taken off the barrel, the same as we did when it gained. We did that so as not to create an erroneous idea in the minds of our customers. We received at the yard 150,000 barrels in round numbers from the time the yard opened in April, 1907 until April 1st, 1908. About 45,000 barrels of that quantity were regraded—45,200 I think are the exact figures. The grade was not changed on all of those 45,200; part of it would gain and part of it would lose; on both of those the grades was changed and correct grade put on; what remained the same grade it was then shipped; from the South the grade mark was left on the same as it was. The rosin that we got in our yards came up by steamer; we had some steamers to come direct with full cargoes, others come by lighters, we didn't have any railroad into our yards, it all had to come by steamer or lighter there. Coming by steamer, we had one line coming from Brunswick that we gave very large quantities to, if we gave them a certain quantity they would come right into our yard and discharge; others would send the stuff down to the yard by lighter. The lighters would take it over the ship's side as it come into the other docks, some steamer carrying a general

cargo, and they would not go to the yards. Nothing came into the yard except this that came from ports and where it was brought by steamer, only might once in a while be a truck load that would come in from some scattering place, that they had failed to put it on the lighter. I don't presume there were over 200 barrels that ever came into the yard in any other way than by steamer or lighter. All the barrels have some distinguishing mark on them when they get to New York. From Brunswick we took a great deal of our rosin, perhaps the greater percentage of it, I should say out of the 150,000 barrels, there were 110,000 came from Brunswick. That was usually, though not always, numbered as a distinguishing mark to facilitate the unloading of the steamer, and the stowing of the steamer. My dock has seven doors and each door is numbered, and we store our goods according to these doors, turpentine is what I would say on the end part of the slip, and by loading the turpentine in the front of the ship, and then go on back with the pale rosins, and so on back, so that the dark rosins stowed in the stern of the ship would come along, and the ports just above fitted our doors, so that we get out and the rosin would come directly into the place where it was to be stored, the turpentine would come out into its place, so that it would save any cross rolling, and if properly stored, I was very particular about that—I could unload six or seven, the best day's work I ever did was 8,000 barrels—I had no cross rolling, the stuff would come right out, and go direct to its particular place; there were seven doors and each door was divided into two marks by numbers. There was some rosin that come up with what I call our shipping mark; the greater part of the rosin that come
204 from other ports was marked with marks instead of numbers. There was some numbered, but not so much, because it made very little difference, the only thing was that our Italian help got used to the numbers, and knew right where a barrel belonged. Out of the total quantity of rosin received I should say that there were 44,000 barrels that came in with those shipping marks on them. I cannot give the exact dimensions of the yard, but if I had 13,000 barrels it was about all I could handle advantageously without double tiering. Anything more than that made it very disadvantageous, and rather expensive handling. At times when we were crowded like that I sampled less than I did at other times, that is to say sampled less of it 100 per cent. I would then resort to the ten per cent sampling method in order to expedite my work. It would be a rare case that less than ten per cent of any lot was sampled; there may have been a few cases where a small lot would come in, and I would just ask them to test them, and let me know how it stood before anything further was done. By small lot I mean 50 to 60 barrels, coming in over the Old Dominion steamship line. I find there were three lots marked up without test, one a 200 barrel lot, one a 299 barrel lot, and another lot of about 300, a few barrels one way or the other; I didn't know that at the time. It was a time when our yards were very full, and I presume the boys did it to expedite their work and catch steamers going out, at least that is the explanation they gave to me when I discovered it and asked them about it. I have delivered a higher

grade for a lower grade, I should say five or six thousand barrels perhaps, it might be up as much as 10,000, it may run as low as four; I should say five, six, seven thousand barrels would be a fair estimate. Turpentine was stored in our yard in New York. Turpentine was handled at one end of the yard, and we put skids on the floor and barrels were rolled in on those skids; I usually tried to handle it without double tiering; sometimes it was necessary to double tier. It was gauged and delivered out of there the same as from the other yard. If we sell turpentine on what we call New York conditions, the trade all demand New York gauge. If we sell CIF, then they have to take the barrels as they come from the south. CIF means cost, freight and insurance; we bought a great deal that way and sell a great deal that way. By the method that we are compelled to pursue we invariably lose in quantity. There are two reasons; it is a subject that I have perhaps given more thought — than any other subject in connection with my business. The barrels come up from the South. To illustrate, I buy

205 100 barrels, I would have it come up and go — the yard to be regauged. In our early experience we lost a great deal on account of leakage, and after we got that question fairly under way I found that the turpentine condensed, being much colder in New York than it is down South, especially in the Winter time, and our trade demand that we regauge and re-out it, and you take the difference in temperature would make a difference in the bulk, while it made no difference in the weight; and we got in some rather heated correspondence with the American of West Virginia about this subject, especially when we were trying to meet the leakage question; and it also got in the same position about the condensation; I could not believe that the condensation was as much as they claimed. The result was that after a time of heated correspondence they experimented, and they put up an experimental plant, I believe in Jacksonville; and the correspondence terminated by them sending me a table which would show exactly how much turpentine would condense. I did not believe the table. As a result of it we stopped just exactly where we started, and I know just about as much about condensation and expansion of turpentine from a practical business standpoint as I did before I spent months corresponding about it; and there is loss by that method going on just the same as it did before. Occasionally I have complaints from my turpentine customers.

Q. Is that usual or unusual in business?

A. Not in the turpentine business.

I have had very little experience in selling other things; I sold corn and potatoes; customers always satisfied. I have the same complaints as in the other line of business. I was in the wine business a while, we had more complaints in that than in any other. I have been in the naval stores business 17 years. I have had complaint as to the measurement of turpentine, short measurement, that the barrel did not have enough in it, from two or three different people, more perhaps. Complaints were very unusual; once in a while there would be a barrel that was leaking, or a barrel that did not contain as much turpentine as they thought it should. I had

a complaint from John A. Casey Co. in the fall of 1907. They claimed that there was a shortage of some few gallons, I don't just remember the number, and Mr. Wagner called me up on the phone and told me about it, and I sent a young man down there, and found out there was a mistake, and the matter was adjusted to entire satisfaction. And I might add that I have never lost a customer by any of these petty complaints that you speak of, they are all buying from me the same as usual. The same is true of Casey, they continuing to buy in large quantities. I have never had any complaints from them as to rosin. I have had complaints from some as to rosin at various times since I have been in business, but they were a very small affair, but I have never lost a customer on account of any complaint. If there was any it was adjusted, and they have been very infinitesimal indeed. I know of no scheme involving this place, or the transaction of business there, of any kind, as to raising grades or false gauging, or anything of that sort; no such scheme was communicated to me in any way by anybody.

Cross-examination:

Mr. Geo. Stevens is vice president, Mr. Elmendorf is secretary and treasurer, and Mr. George Peterson is assistant treasurer of the National Transportation & Terminal Company of New York. Mr. Geo. H. Stevens is now and was during the years 1907 and 1908 manager of the turpentine department of the American Naval Stores Company of New York. Mr. Elmendorf was cashier, and Mr. Peterson is now assistant cashier of the American Naval Stores Company of New York. During the year 1907 up to April, 1908, Mr. Peterson was a boy in the billing department of the American Naval Stores Company of New York, and I advanced him. I was president of the National Transportation & Terminal Company of New York, and also its manager and was during the year 1907. Mr. Ketchum was manager of the yard down there, having general supervision of the yard over in Brooklyn of the National Transportation & Terminal Company of New York. I employed him. I am not a stockholder in either the National Transportation & Terminal Co. of New York or the American Naval Stores Co. of New York. I am a salaried employé of the American Naval Stores Company of New York; the position with the National Transportation & Terminal Co. of New York is purely honorary, for which I get no compensation at all. The officers of the American Naval Stores Company of New York are E. S. Nash, president; Mr. Shotter, chairman of the board, I think; Mr. J. F. Cooper Myers, vice president; Mr. Deloach, secretary, and Mr. Boardman, treasurer. I am the general manager of the New York part of that company. Its books are all kept there in New York. The profits or losses, as the case may be, are passed on to a dividend to the stockholders; it has made some money. I do not know who the stockholders are. I employed Mr. Ketchum, and sent him over there to take charge of that yard. Mr. Ketchum came from Mobile, where he had been

working for the Union Naval Stores Company. The trade
207 in New York required New York inspection; we sell always
with a New York guarantee; not always with the guarantee
of Bealing, Nemeier & Wessels; Mr. Hammons is just as reliable as
Mr. Bealing. In some cases we might get a stamp of approval of
some shape on our bills of Bealing, Nemeier & Wessells; but my
word usually goes; I tell gentlemen that I guarantee it, and that is
enough for them. I understand that Bealing, Nemeier & Wessels
are inspectors recognized by the Produce Exchange. The American
Naval Stores Company nor the National Transportation & Ter-
minal Company has ever taken a bill to Bealing, Nemeier & Wessels
and get their stamp of approval on it, without their ever seeing the
goods, upon our guarantee that it is all right; I do not know of
any case in which Bealing, Nemeier & Wessels do that, I could not
say positively. I have seen rosin graded down sometimes over
there on the yard, and have seen it graded up, too. I buy so many
barrels of rosin of a certain grade; I never called for any particular
inspection; and I paid for it according to the Brunswick inspection,
for instance. If I reinspected I sold according to these other grades
that were put on it.

Q. Did you ever personally superintend the reinspection at all,
didn't you stay over in New York?

A. I was at the yard quite often, I do not know as I ever —
only in one or two cases, perhaps where there was a very bad dis-
crepancy I would go over and look at it to satisfy myself.

Mr. Chas. E. Smith was our inspector on those yards, and was ap-
pointed by Bealing, Nemeier & Wessels. We paid Mr. Hammond,
who employed him, for whatever inspection he did over there of
our rosin. I positively do not know of a case where goods were
raised over there after he had gone through and made an inspection
on barrels which he marked that would not grade up. I kept in
touch with the stock over there. If grades were graded up the sheets
that came back to my office would not show the difference in the
grades, they would show his inspection; he gave a slip into the yard
office of what he made, and that was passed on, and a memorandum
of that was sent. Mr. Smith was there quite often to inspect; I could
tell by my bills that we are charged up for so much time, I should
say he was there about half of his time. I am positive he was not
just called over there occasionally, unless I have been cheated in my
bills; I watch this pretty closely. If the rosin which we bought
at the lower grade of the south had the grades raised legitimately
or illegitimately, and sold at a higher grade, we certainly would

208 have a record of it in our office; in other words we have in
our office a record of all the grades we bought and a record
of all the grades we sell. I reported daily by correspondence
or personally the operations of the New York office of the American,
to the American Naval Stores Company of West Virginia, that is the
general operations of the New York office of the American Naval
Stores Company of New York were reported to the American Naval
Stores Company of West Virginia at Savannah; my mail being all
addressed to the American Naval Stores Co. at Savannah. My re-

ports showed daily purchases and daily sales of the different grades of rosin.

Q. Did you go into detail or did you just report, I have sold so many thousand barrels of one grade, or so many hundred barrels of one grade, or did you report to whom you sold them, or who you bought from?

A. I have the sheet that at night the balances are taken from, and the purchases and so on of the next day and the sales deducted, and the balance brought down, and it is passed on to the Savannah office. I reported to the American Naval Stores Co. of West Virginia because I took all my orders from the Savannah office. The American Naval Stores Company of New York through me and the American Naval Stores Company of West Virginia certainly did get into a very heated controversy over the question of the loss of turpentine. It is based on 60 degrees Fahrenheit, mean average temperature; but I do not know that a reduction in temperature of 25 degrees will reduce it approximately one per cent, nor do I know the percentage of expansion caused by 25 degrees increase in temperature; I know it will do quite a good deal in that direction, that is what I have not been able to learn. Always, that is since I have been in business, my turpentine was coming up there short. I bought supplies from the south from various places. I buy from the American Naval Stores Company the greater part; the greater part of my turpentine comes from Brunswick, originally from the Downing. For the last couple of years I have got most of our supplies from the Downing Company of Brunswick, originally; before that I took them mostly from Jacksonville, prior to that mostly Savannah. I could not state the percentage of turpentine and rosin stored by Casey, Seely, Larenden, Turton, Gunnerson and Jennings on our yards for the year beginning April 1, 1907, and ending April 1, 1908, and what its proportion was to that stored by the American Naval Stores Company. The American had a very much greater quantity. Casey had the next. The stuff that Seely stored over there he always bought from us; he could have put it at
209 the other yard if he wanted to. Turton bought mostly from us, very little indeed from other sources; the same is true as to Larenden. The American Naval Stores Co. of New York and Tom Seely never had a joint account for division of profits made by Tom Seely. The American Naval Stores Co. of New York never got a cent from Tom Seely except for goods actually sold him. Mr. Brooker, a chartered accountant, examined his books at one time for the old Shotter Co. Tom Seely was engaged in the same line of business we were there in New York, selling the same class of goods to consumers. Mr. Turton was engaged in the same line of business, and was a real competitor. The same is true of Mr. Larenden. There was positively no agreement of my knowledge for a joint account or the divisions of profits or losses between the American Naval Stores Company either of New York or New Jersey with Turton or Larenden. I mean to say there was none, because if there had been one I as manager of that institution would certainly have known it. In my letters to Fels & Co. the Mr. Shotter and Mr.

Nash I refer to are Mr. S. P. Shotter and Mr. E. S. Nash. Mr. Shotter and Mr. Nash came to those offices there in New York comparatively frequently, they felt perfectly at home there; and when they came there I consulted them, and they gave general directions. Mr. Shotter went over on the yards of the National Transportation & Terminal Co. at one time during the year 1907 at my request. Perhaps I did send word over there a day or two beforehand to have things straightened up. He walked down through the yard, and I showed him what places were there; did not go through the rosin sheds; walked down toward the turpentine shed and across the dock.

Redirect examination:

Q. Mr. Akerman asked you some questions about the New York Company buying according to Brunswick inspection, what do you mean by that, what is the fact as to that?

A. I understood him to mean do I pay for the goods as billed to me according to the weight sheets sent me, and I answered I did.

I do not go behind the Savannah American Company as to inspection, I held them responsible.

Q. Whose inspection do you refer to then, when you bought, say from Brunswick or Savannah?

A. I don't know who inspects them; I take it I always call it southern inspection, I am not familiar with the way that is handled here in the south.

210 I have no reference to the inspection say of a Florida officer or a Savannah officer, I know nothing about that. I have the records here of the inspection yards and the daily reports from the yards; I think they are at the hotel. Those reports to Savannah show, as I explained, the receipts, the actual stock on hand at night. My office is so constituted that every night I have on three sheets of paper the transactions for the day in every department. It starts off with the stock on hand, then it shows receipts, and then it shows deliveries, the same as a cash report, does the same thing. I can't say that it shows anything as to grades, or changes of grades, unless I saw one. I not recall whether there is any showing made of that or not. I have not one of the sheets here. I said practically all, did I not, of our turpentine came up there short? I mean that the barrels did not contain as much in bulk in quantity when they arrived there as they purported to be when they were shipped from the South. I account for that in the two ways which I tried very hard to explain, by leakage and by condensation on account of the cooler atmosphere in New York. It was true of all of the turpentine. I never saw any difference whether from the American or from any one else; in fact the American—we compared different ports and in my reports I always made the comparison with the best one; Wilmington was best, first Brunswick was best, then Wilmington got ahead of Brunswick, and it was about the same with the two, and then Jacksonville was about the same as the others. The American Naval Stores Co. of West Virginia sent from Wilmington. The greater part of the turpentine came from Brunswick, Mr. Downing of the Downing Company, I should say 90 per cent, perhaps.

When I found it short I would fill the barrels up to within one gallon out, the other yards didn't do that, we people when we first started our yard were not used to that; if the barrel was two gallons out it would be marked two gallons out, and sent out; I filled every barrel before it was shipped, or endeavored to, if it did not come out but one gallon out it was because my instructions were not followed; but every barrel was filled within one gallon out. I don't recall that I did send down to the yard to have things straightened up before Mr. Shotter went there; I may have said so, I go down there myself, and I was down there a few days ago, and I told the foreman, I says, "The yard don't look well, you better get it straightened up," I hate to see things mussed up, and I didn't want to take any one over there—if you went there, I would want it to look respectable and business-like; I take pride in my business.

211 D. W. FLETCHER, sworn for the Defendants.

Direct examination:

I live in Philadelphia, where I am representative for the American Naval Stores. Tentative offers are the offers that you make on the market between the fluctuations. It is good for immediate acceptance or to be accepted before the market changes at Savannah, which controls the Philadelphia price. I never bought from Mr. Graves' firm, always sold them. If I were to make what I call a tentative offer to Mr. Graves, and he did not accept it immediately, and came back one hour afterwards and told me that he had accepted, if the market had not changed at Savannah we would accept his order. If it had changed, we were not at all bound to accept. He understood the way that we handled it exactly as every consumer and buyer in the Philadelphia market does. These tentative offers are not peculiar to the American, it is the general price and the consumers and buyers generally want your prices, and they understand that if they do not accept them and the market changes that they will be asked to pay the advance, or if the market declines they are given the benefit. During 1907 or 190^y [1908] Mr. Graves himself personally attended to all the buying through his stenographer or anybody that happened to be there. He is a buyer that generally keeps in close touch with the market, and frequently would call up through his stenographer for quotations, but very seldom himself. In the summer time he lived at Cape May, and he comes up to Philadelphia, as I understand, about once a week, chiefly or principally at the latter part of the week, and sometimes not at all for weeks at a time. I think L. S. Jackson & Co. were representatives of the Patterson Export Company during 1907 and 1908. I never had any connection with the Patterson Export Company or any representative of theirs during the time. I didn't know L. S. Jackson or any one connected with him as a subordinate or an employé; never met him any way socially or in a business way; I would not know him if I were to see him. I had nothing at all to do with the Patterson Export Company's representative at all; never had any transactions with the Patterson Export Company while I was

there. If Mr. Graves saw their people in the morning and then when he went back he could not get what he wanted for any reason from the Patterson Export Company people, I absolutely did not have anything to do with that. They were competitors, and treated in that fashion. They treated me that way, and I treated
212 them that way. We made our quotations and I suppose they made theirs. I do not know whether they even quoted. I supposed they were there quoting, but as far as knowing anything about their methods of doing business, or when, or how, or where they quoted, I do not know.

E. H. SHEA, sworn for the Defendants.

Direct examination:

I am in the employ of the National Transportation & Terminal Co. I came to Savannah at this time because I got a subpoena from the Government, and have been here since Tuesday night a week ago. I know Hoskins, a colored man; he was employed under the turpentine sheds. I know under what circumstances his employment ceased there. He came in the office one day with an order, on Saturday, signed by one Joe Carroll, to get Carroll's money, and I gave him the money on the order, and a little later Carroll came into the office to get his money, and I told him I had given his money to Hoskins and showed him the order. Hoskins took the money out of the office. He was called back to the office and made to give Carroll back his money by Mr. Tison. He was discharged on that account.

Cross-examination:

I have been with the National Transportation & Terminal Co. a little over two years. Mr. Carl Moller is the Florida manager of the company. He came out to those yards very frequently. Hoskins was working there when I first went there. I do not know the exact nature of his work. I was bookkeeper in the office. I never heard about his being discharged about a fight; I know that he had the fight; that was after he was discharged.

Redirect examination:

He had the fight after his discharge with Carroll, who was a colored man.

213 R. H. KNOX, sworn for the Defendants.

Direct examination:

I am in the lumber business, have been for 31 years, and am associated with Hilton & Dodge Lumber Co., whose business is extensive. I am familiar with the prices of lumber in 1907 and 1908. Prices have been low, there has been a downward trend since the middle of 1906, and during 1907 and 1908 the prices have been low. We do a large business in selling lumber. I do not know that any concern does any more manufacturing than ours; I think we

are probably the largest manufacturers in the State, and sell our own manufactures. We sell lumber on grade. Complaints are quite common in the lumber trade.

Cross-examination:

One of the factors for less demand for lumber was decrease in car building; had a good deal to do with the decline in price, and I suppose in long leaf dimensions. We were not able to cut the cost of production down very much until the fall of 1907, but it came down then. There is nothing like the stock exchange in New York is which fixes the price of our lumber; there is no one primary or basic market city which fixes the price for the world. In 1907 we came very close to selling for less than it cost to make it, that is averaging all grades; we did not operate at a profit; I think it was a little to the good.

Redirect examination:

The railroads were out of the market with orders for lumber, that affected the price of long leaf dimensions. Over-production was one of the factors for the depression. During the time I speak of I think it is true that there was a general depression over the country.

Recross-examination:

That was in the lumber business during the entire year. I think the general depression existed prior to the money panic of 1907; that was the crisis.

214 JOHN A. REGISTER, called for Defendants.

Direct examination:

I have been sworn already. I am a city inspector. I have seen a barrel of WW rosin contain some black rosin. It is not possible for two inspectors to gauge a hundred barrel lot of spirits and get exactly the same result, neither knowing what the other has done; it will vary. The standard types sometimes vary. Meaning by regulate to take some turpentine out of barrels and to put some in, if necessary, I know that the custom in Savannah is to regulate the stuff, some cases to take out and some put in, after the buyers get charge of them, after the inspector has finished with them. I think it is the custom for all buyers to keep packing barrels, to pack barrels which may be leaking or in turning, and so on. "Turning" is to turn a leaky barrels into a merchantable barrel. You could not turn into a new barrel from a leaky one containing say 52 gallons, and get exactly the same quantity out of the new barrel, there would be a trifle short when it was turned on account of a little wastage and spirits that will stick to the barrel, and so on. No two inspectors can go over a lot of say 500 barrels of rosin and get the same results.

Cross-examination :

If the standard types are properly prepared, and are not too old, they ought to be practically the same, with some little variance. They fade a little. Rosin in a barrel close to the head fades with age. There ought not to be a great difference attained by two equally competent inspectors with equally correct standard type in grading 500 barrels; each man won't get his samples from the same place every time, the same depth.

C. W. DILL, recalled for the Defendants.

Direct examination :

This parcel contains the slips that Mr. Smith, the inspector, hands into the yard office. They are very crude. I did not expect ever to use them; they come over in the daily routine, and he would inspect a certain number of barrels of rosin, he tested these in
215 the room that he calls the sample room, cuts the samples, puts them on a board, and carries that in, and each one is inspected, compared with his type, and these slips are made out. He hands them into the yard office, and I think, in fact I know, that those represent the entire inspection from the time that they are opened until the date in question, and they are his original memoranda. Those are a duplicate of these, and these are the slips that are sent to the American Naval Stores Company office representing these. A memorandum is kept of these in the yard office, what we call our grading book, and this is the original, goes on the books, and then these are sent to the office. These the New York office had never seen until I called for them, and I was surprised to find that they had been kept intact. They represent the quantity of rosin that I mentioned yesterday, and cover the period that I testified about. This is complete, the entire file. They show the amount of inspection that was carried on there.

Cross-examination :

I have not the reports made to my office by John Clehan; I do not think he has ever made any reports; I never saw any. I have no reports made by Mr. Ketchum of the changing of grades, regrading; as I stated, there were only three cases that I knew or found it, I did not know at the time that that ever occurred, and I did not find any memorandum of that until I went over the regrade book, and found it had been done. I do not think that a great many barrels, large lots of them, the grades from them were erased just as soon as they arrived, as they went into the yards, and were never seen by Smith at all. I will swear that I never saw it done, and to the best of my knowledge and belief it was not done. I do not know that barrels were regraded on lighters and at the wharf, at different places in Brooklyn and in New York and sent on to the customers without ever going through the yards, brushed up with a brush without any sample at all. We had lighters pulled down to the yards in a couple of instances, and the test was made

of them, and then they may have been changed in accordance with that test. I think Mr. Smith usually puts the grades upon the barrels, though I could not swear to that. I remember David Hill was employed there. I do not know that he very frequently would brush up a lighter load without any inspection at all. I do not think Mr. Smith, the inspector, sampled a portion of every lot that came in except those three I have mentioned; the lower grades, E and below, or especially below E, we rarely ever sample at all; but I think it is a positive fact that if my instructions were followed out, and I believe they were, that we took a ten per cent sample of everything above that that was ever changed. Supplies would come in there quite often, but about once a week in a large way, and occasionally smaller lots would be coming in. I think that is an absolutely complete file of what Mr. Smith inspected.

L. M. LEHARDY, sworn for the Defendants.

Direct examination:

I am now, and have been about fifteen years, in the cotton export parties. We sell in the cotton centers of Europe, Bremen, Liverpool, Havre, and various points; and in this country to the mills, both east and south. Cotton can be bought on grade, and when it is examined at the port, if it turns out what we think is better, we put it in a higher grade; if it turns out below what we think is the grade, we put it in a lower grade. There is nothing unusual about putting it in a higher grade. In selling cotton we sell by grade, arbitration abroad, if it goes abroad. The general rule is that there are complaints on cotton shipped abroad, on the bulk of it, both grade and weight; the mills in this country are even worse.

Cross-examination:

Cotton is not graded by sworn bonded inspectors; the exchange makes the grade, but it is not law. There are three controlling cotton markets. I do not think there is any one concern that handles as much as sixty or seventy per cent of the distribution of cotton on the earth; but I cannot answer that positively. I know that there is not. I do not know that it is customary in the cotton trade just to brush up a bale without retesting it; cotton is usually sampled before it is marked. Cotton in this country and abroad is sold on grade, the samples are not sent; it was formerly done; early in the season they send samples to represent the cotton.

217 HENRY ELSON, sworn for the Defendants.

Direct examination:

I am manager and treasurer of the Atlantic Naval Stores Company, exporter of rosin and turpentine in Jacksonville. The American Naval Stores Company, nor the N. T. & T. Co. nor any gentleman connected with that company is interested in my company. We keep our naval stores at the N. T. & T. Co., but formerly kept them at the Atlantic Coast Line, but changed because the service did not

exactly suit us. We have found the services of the N. T. & T. Co. very satisfactory. We are a competitor of the American Naval Stores Company. In purchasing turpentine and shipping it for foreign shipments it is usually regulated; say for instance, if you bought turpentine in the morning, you usually regulate it in the afternoon, at least it is done that way on the yards. Regulating is regauging the turpentine, getting it in good shape, proper shape. Regauging it to see that the gauges are correct, and the barrels are in proper shape. After the inspector has inspected, sometimes we have to fill the barrels up, and sometimes take some out; sometimes we gain and sometimes we lose; that is common with everybody. It is owing to the weather conditions. Turpentine is usually taken over in the morning and put in shape in the afternoon. A barrel of turpentine is usually gauged with one gallon out, and during the hot weather I suppose the turpentine expands, and sometimes there is a little over, which is taken out, and then again sometimes there are some barrels that are leaking, and it has to be put in the other barrels.

Cross-examination:

The capital of our company is \$26,000. I expect it is competition in a small way with the American. We organized with \$26,000 capital; we might now have more or less. I adhere to the statement that regulating turpentine means reinspecting it. Upon reinspection occasionally we find a barrel that is leaking, and it is turned into another barrel entirely. Occasionally from an excessive hot spell of weather we would find some barrels that had been expanded so that the gallon outage would not be there; to that we would add a little. Since I had the management it has not been our custom, without regard to that, to go down a line of barrels taking out a gallon after the inspectors; I could not tell you that anybody on
218 earth has done that; I have never seen it. The regulating I speak of is the turning of a leaky barrel, or the occasional removal of a part of the contents of a barrel that has expanded in the heat of the sun, or something like that, or filling one that is light. We do mostly foreign weight; we do not sell by weight. I expect it is by weight. We have never sold it that way, we sell it by gallons, and the gallon is the basis for calculating the weight, figured seven pounds to the gallon. I have never sold any west. The coastwise stuff going from Jacksonville and from east of Pittsburgh and Pensacola, that is sold strictly by the gallon, without regard to weight. I do not know that it would be perfectly immaterial, so far as foreign shipments are concerned, whether the barrel was full or half full; I suppose it is sold so many pounds to the gallon, seven pounds I think. I don't think we have ever sold it that way; I do not know.

J. H. TISON, sworn for the Defendants.

Direct examination:

I am employed by the National Transportation & Terminal Co. at Jacksonville, being custodian of their yards there. I am head of Woods. After turpentine is delivered to us by the inspectors in the

morning, we examine it in the afternoon after twelve o'clock, and if it is found full, we take out a gallon, and when we ship it we examine the per cent of the stuff, and if it requires packing, we put more in to a gallon out. That is after we get it from the inspector. That has been the custom of the trade ever since I have been in the naval stores business for the last twelve years. I never have given any instructions to Mr. Woods or any one else to pack turpentine more than a gallon out; my instructions have been to pack it to exactly a gallon out; if more than that has been done, it has not been done with my knowledge or consent. By regulating I understand packing to one gallon out, where we find that it is full we take it out, where we find that it requires more, we put it in. It requires all the "overs" that we make from regulating to pack up shortages that will occur in the winter time when the weather is cold. I do not know that we make any money out of it; we make some turpentine in the summer, say from April to August, and after that it requires all we have made to take up our shipments later on in the season. I have never received any instructions from Mr. Moller, Mr. Nash, Mr.

219 Shotter, Mr. Myers, Mr. Deloach, Mr. Boardman, or any one of them, to do anything other than what I say has been done, or to do anything irregular or improper about those yards; nor have I received any such instructions from any one representing either the American or the National Transportation & Terminal Company in any way; they leave the shipping entirely to my discretion as to what I think is fair and right. I have never consciously been unfair or fraudulent about it. We have a small measuring tank on the yard that we use to measure the capacity of barrels as to their gauges when turned over to us by the inspectors. We never have had any experiment for heating other than just a coil that we used on one occasion in order to demonstrate that turpentine would expand if the temperature was raised; for no other purpose; only used once. It resulted from a controversy, as I understand it over stuff that we were shipping, and when it would get to its destination it would not be packed up to the right capacity, which we had claimed was due to a difference in temperature and the destination of the turpentine, and it was done just to demonstrate that. That was the experiment which the young gentlemen named Hoyt of Jacksonville was connected with. There was never any connection of any sort between that small tank where the experiment was made and the large tank in which we keep our turpentine so far as heating or anything like that was concerned; it was several hundred feet away. I have never at any time put water in the tank, and have not known it to be done since I have been on the yard, nor before. Those yards are open to everybody. Absolutely no difference is made between the facilities furnished the American Naval Stores Co., and other people who patronize the yard; everybody gets fair treatment. Hoskins was discharged by Mr. Woods under my instructions for drawing another man's money on a forged order.

Cross-examination:

All I know about it is that Hoskins presented this order and it was honored; Carroll afterwards claimed that he gave no such

order, and I made Hoskins give Carroll his money back, and authorized Mr. Woods to discharge him. The man said that he did not write the order, said it was forged, I only have his word for it. I made Hoskins give the money back. Hoskins and the man fought after all this happened. The experiment was made with that turpentine tank on a holiday because it suited Mr. Driscoll's convenience to be present in Jacksonville on that day. There were no hands other than Hoskins told to leave; as I remember it, 220 Ed Carr, a negro was there. I told Hoskins to leave because we had no further use for him; I do not know that he was told not to listen to anything he heard, for him not to know too much; I did not hear anything like that. The American Naval Stores Company and other buyers engage to receive their consignments from the inspectors after 12 o'clock, and not before. They are gauged to be shipped out by the inspectors; we do not gauge them. We do our regulating when we receive it from the inspector, and we also examine a percentage to see that it is packed up before we ship it out. The buyer receives upon that inspection certificate after 12 o'clock. During 1907, up to April, 1908, Dan Wilson and Hoskins were employed there. The goods were bought upon the inspection of these inspectors. The regulating went on in the afternoon, when everyone was present, not immediately following the inspection; right after 12 o'clock I said when we received it. The inspectors had just inspected it before 12 o'clock, and then we received it and the regulating started right straight; not right straight, all in the afternoon, but after 12 o'clock. We call that packing to a gallon out, it means the same thing. The inspectors didn't regulate it to a gallon out, they had nothing to do with it; we did not regulate it again immediately following that; that was done in the morning when the temperature was ten degrees lower than maybe it was in the afternoon. If the inspector did his inspecting early in the morning when the temperature was low, and we did our regulating immediately following 12 o'clock, 99 cases out of a hundred the temperature would of course be higher than it would be in the morning, and if the temperature was higher, the volume of spirits had expanded; and we never had in the regulating to take any out, to add any, not that we regulated.

Redirect examination:

There was regulating after that only when we went to ship out; if it required packing, we put more in. After the inspector has regulated it, it is dumped into the storage tank, most of it. I should say 75 per cent is put in storage tanks. So that after the inspector has inspected it in barrels I would say that 75 per cent was dumped into storage tanks. Hoskins drew his money Saturday afternoon. He reported back for work Monday morning, and I told him to get off the yard, and stay off; that the company would not allow any such man as him to work on the yard. I do not remember, of course, exactly the conversation verbatim.

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CARL MOLLER, one of the defendants, sworn.

Direct examination:

I am one of the defendants. I live in Jacksonville, have lived there about six years, living before then at Pensacola, and before that at New Orleans. I have lived in the South about 25 years. I made that diagram. That is a small galvanized iron tank. It is only 56½ inches long, 16 inches in diameter and the neck only 24 inches long. That was made for the purpose of testing the true contents of a barrel. It has a gauge glass on there so that you can see how many gallons have been put into that tank. At one time we put a small steam coil in here so as to get at the variation of turpentine by expansion from heat. We turned steam on that little coil and watched how the turpentine would rise as the temperature increased. That experiment was made one day—it was a holiday—because I had time to spare with another gentleman. That is the only time that that steam coil was ever used. There was no connection whatever between that small tank and the large tank where we kept our turpentine, by heating. This is to turn the stuff out after we had measured it. After we had measured it the turpentine in this small tank was just turned out into a dump trough. I am the general manager of the National Transportation & Terminal Company; I go down to those yards very often to see that things are conducted in a proper manner. Mr. J. H. Tison is the man in charge, the one who has just testified. I have never known anybody to heat turpentine there except that one occasion. If turpentine were heated, it would expand temporarily, and then it would contract again in a little while. There would be no sense in doing anything such as that. Between May 1st, 1907, and April 1st, 1908, 83,879 barrels of turpentine were shipped from the American Naval Stores Company from the yards of the National Transportation & Terminal Company. 76,790 barrels of it were exported and sold by weight and then there was more stuff sold by weight that went in tank cars. There were altogether 3,093 barrels went in tank cars, and there were 3,065 barrels that were sold subject to regauge in New York and Boston. There would be no advantage to the American Company to take more turpentine out of a barrel than ought to have been, in foreign shipments and other shipments by weight, because it is sold by weight. There were 7089 barrels altogether domestic, and out of that 3093 went on tank cars, and 3065 were sold on regauge. That would leave a
222 little over 800 barrels sold on their gauge. Of the 7089 barrels that were shipped domestic, a little over 6100 barrels were paid for by the sample, by the weight or northern gauge. About 800 barrels of the 83,879 barrels shipped from Jacksonville was sold to consumers on the original Jacksonville gauge. I mean to say that out of this 83,879 barrels during this time all but 895 barrels were sold by weight or regauge at point of destination. If there was a practice there of taking out too much turpentine or false packing or taking packing of any kind, the American could not get the profit of that in any way. If we were over any packing that

would be held as a reserve to make up for short packing, leakage, anything on that order. I do not know anything about any scheme or plan to restrain commerce or monopolize commerce in any way; nobody ever communicated anything of that sort to me. If any employé of that yard took out too much turpentine or was guilty of any irregularity, neither Mr. Nash nor Mr. Myers nor Mr. Shotter nor Mr. De Loach knew anything about anything being wrong, there never has been anything wrong. If what Hoskins says be true, I know of no representative of the company who knew anything about it, or was advised of it in any way. I do not know anything about Hoskins' discharge except what Mr. Tison told on the stand. What to take out and what to put into turpentine was left to Mr. Tison's discretion. He was the superintendent and general custodian of the yards, a man that knows his business.

Bill Hoskins came to my house one morning about breakfast time, and said that Tison had informed him that I had told Tison that Hoskins could not work for my competitors. I told him "You are getting twelve dollars a week from me regular. You attend to my business, and I won't stand for your working for my competitor while you are getting my good money" and run him off. I did not tell him anything as to my company or me not standing competition; I would not discuss such a subject with a negro.

Cross-examination:

Hoskins was working for the National Transportation & Terminal Company. Hoskins referred to the American Naval Stores Company when he was talking. He was paid by the National Transportation & Terminal Company, but was looking after the shipments for the American Naval Stores Company, which paid the N. T. & T. Co., for such services. And in addition to that, they paid a fee for having a man go down there to the ships to look after
223 such business as needed cooerage at the ships. Any other shipper paid storage to the N. T. & T. Co. Mr. Tison was in charge down there, he was not the office man, he was on the yards all the time; he had full charge of the office and yards. Mr. Woods under Mr. Tison had charge of the spirit shed. Hoskins was employed there; Dan Wilson was employed there. My title was general manager for the National Transportation & Terminal Company and just manager for the American; I looked after their Florida business. I reported to Savannah, the American Naval Stores Company, Savannah, or National Transportation & Terminal Co., Savannah, my communications as a rule being addressed to the company. The various officers in the company, Mr. Shotter, Mr. Nash, Mr. De Loach, Mr. Myers, gave me directions. I was in constant telephone communication with them, every day practically. I telephoned to Mr. Myers, Mr. Shotter, Mr. Nash, Mr. De Loach; and the same gentlemen would telephone me, not all of them, almost daily. I never sold a barrel to the consumer myself recently; I have done it in the last five years, since the American Naval Stores Company was organized; I have personally sold to Bond & Wood at Jacksonville. I never sold a barrel of this coastwise stuff to a con-

sumer myself. The American sold to our Savannah office, and re-shipped on their instructions; that is the Florida end of the American Naval Stores Company sold it to the Savannah end of the American Naval Stores Company, and it sold to the consumers. They did not sell all of it to the American Naval Stores Company of New York. I know that the barrels went to the consumer upon a regauge by their records and by talking with them this morning in the office. I did not know it myself; I did not have anything to do with the sale of it; and yet I swore a few moments ago that it went to the consumer upon the regauge. I did know that; I can prove it by our office.

Q. You do not call the Savannah branch of the American a consumer, do you?

A. But I shipped it to the consumer on their orders. The stuff that I shipped to New York would go to the New York office. I would not say that the American of New York are consumers. I shipped it to a customer and sent my bills up here to Savannah office; what they did with it I do not know except from their records, I did not make them, but I saw some of them. We were talking that matter over in the office this morning. I was a buyer for the American when they bought from the factors in Florida. The figures that I have given about the stuff that went coastwise is
224 Jacksonville alone; Fernandina is included in the foreign shipments. I do not think they shipped Fernandina coastwise at all. I have not the Tampa figures here. The steamship "Algeries" made one or two trips from Tampa to Philadelphia I think; we shipped by that, and that is not included in this calculation. When I bought the turpentine or rosin I paid the factor representing the producer upon the gauge made by the sworn bonded inspector, and all of my payments that went to the producer or their representatives were made upon that gauge or the grade of the inspector.

Redirect examination:

I kept data as general manager down there, and tried to keep up with the business done there. I know of my own knowledge that the greater part of the turpentine does go as export to foreign ports. I know that to be a fact without reference to the exact figures. Some figures that you asked me about I got from the books here; I did not keep any of the records here. From my own knowledge, I think the figures that I mentioned are approximately correct. I will swear that the bulk of the turpentine does go foreign, I am certain about it. I keep track of turpentine close enough to know that all right. I go down there on the yards every now and then. The means of information I have as to its being sent out and where it is going are that I order it out, getting the orders from the Savannah office. I do not see all of them of course, but the majority. My clerks under my directions did the ordering out; and I keep up with it.

D. W. FLETCHER, recalled for the Defendants.

Direct examination:

I was not at all cognizant in any way of any scheme or plan to restrain trade or to monopolize trade when I would have these tentative offers with Mr. Graves or his representative. Within my knowledge there was no such scheme or plan of any kind. When I would make a tentative offer to sell Mr. Graves, he would be a prospective purchaser; and he often wanted the prices just for his own information, to keep posted on the market; he would call up most every day, he would want to know the prices. When he would come back

225 I would never decline to let him have the stuff at the price that I had mentioned to him in a tentative way unless the market advanced; or if it declined during the interim we would give him the decline.

Cross-examination:

Before I came down here I knew all of the defendants except Mr. Moller perhaps. I didn't know Mr. Boardman. I don't know how many times I have seen Mr. Nash; I have seen him in New York and in Savannah. I didn't see Mr. Shotter and Mr. Nash very often. I worked for the Bell Telephone Co. prior to the American Naval Stores Company. Prior to the American I worked for S. P. Shotter Co. Mr. Martin, the government agent, got me my position with the S. P. Shotter Co. Mr. J. F. Martin is my brother-in-law.

EDMUND S. NASH, one of the defendants, sworn.

Direct examination:

I live in Savannah and New York; my official habitation is Savannah. I was born and reared in North Carolina. Before I became connected with the American Naval Stores Company, I was connected with the naval stores company of Patterson Downing Company. The Mr. Patterson of that company was not Mr. E. C. Patterson of the Patterson Export Company; that was Robert W. Patterson, no connection whatever. I am president of the American here and also the New York American. I was never connected with any of the acts mentioned in this case charged to have been done to restrain trade or monopolize trade. I was in no respect ever connected with any scheme to restrain trade or monopolize trade. The American is a fairly large company. Within my knowledge and experience I think the American had the effect of enlarging competition, for the reason that the number of competitors, since the organization of the American, or rather the number of dealers, has increased rather than diminished. The number of competitors, they are all competitors, the number of competitors, I put it, or the number of dealers; they are all competitors. That number has increased since the organization of the American Company; I can submit to you data on that subject. I have taken occasion to make a memorandum of the total number having taken them down as carefully as possible of dealers in naval stores, and there are forty

outside of the American Naval Stores Company, and of those forty
whose names I have here, eight have been established since
226 the formation of the American Company. I have not at any
time given or acquiesced in any instructions of any kind to
overgrade rosin or falsely gauge turpentine. I am absolutely certain
of that, and have never known of any plan or scheme of that kind.
Since the American Naval Stores Company was formed I have never
issued any shipping orders for rosin or turpentine of any sort be-
cause it was beyond my departmental duties. My duties are mostly
in an advisory capacity, as to debating and formulating and making
up a market policy, as to what contracts we shall enter into of various
kinds, and a general overlooking of the wider details of the business,
not minutiae. The foreign business is mine particularly. In pur-
sueance of my market policies I dare say that I have authorized the
sale of rosin and turpentine below the cost of production; it is
rather a difficult question to answer, because I do not know what
the cost of production is. I must take as evidence the testimony of
gentlemen on the stand who have testified that the cost of production
was a certain figure. I have authorized sales of turpentine below
that price. I did not think I was doing anything wrong in that, on
the contrary. I sometimes sold below what certain gentlemen have
said would be the cost of production because it was necessary for me
to continue in business; otherwise I could not have done so. I think
that the gentlemen in question have overlooked the fact for our side
that is the question of consumption; if the consumptive demand
were such as will not warrant their paying the cost of production
whatever it may be, my company and likewise all of its competitors
compete for business on the natural basis that has been established
by two laws, the law of production and the law of consumption. At
times naval stores have been very much depressed, and that was de-
cidedly the case, speaking generally, during the years 1907 and
1908. The causes for that are dual. In the first place, the produc-
tion has been excessive as compared with the consumption. The
consumptive demand has been greatly restricted on account of the
financial and trade conditions of the country which are known to
all of us, they hardly need to be dilated upon. I have invariably
urged a smaller production, urged it in season and out of season, and
very ineffectively. Taking the evidence of the gentlemen as to the
cost to be right, I have bought turpentine very much in excess of
the cost of production, doing it as a purely commercial proposition;
if my judgment of conditions were such as to indicate to me that
the consumption during a certain period would exceed the
227 amount of supplies, the natural inference would be that pur-
chases would eventually result in profits. I have the figures
as to the quantity of turpentine produced in 1907 which, through
an appropriation to the Census Department, were gathered by the
government itself. I will give those rather than any that we may
have. I must say, however, that there is no great difference in the
compilation of my own company and that of the Government, but
I give the Government figures. For the year 1907 the crop of tur-
pentine was 683,000 barrels in round figures, and in round barrels

of rosin about 2,285,000. The government figures as to turpentine are in gallons, and in rosins are per 280 pounds, but we have converted them by dividing by 50 and 280, reaching those results—rather by 500 instead of 280. During the year 1907, the average price of turpentine was about 53 cents, and rosin was about \$7.50 per round barrel or container.

Q. What was the cost of production of those articles?

A. I am not an expert, not even a non-expert.

It is a regrettable fact that the consumption has steadily—or the production has steadily exceeded the consumption for the last four years. We reach that information or conclusion by the figures which we compile as to the world's visible supply month by month. That includes all of the ports of this country and the different ports of Europe. It does not include the markets of France, which are very important as to turpentine, but where information is unattainable. That would be only a matter of surmise; but taking actual figures—and I will take only the first of the crop year, that is April 1st—the world's visible supply in 1906 was 65,000 barrels. That was the visible supply, the demand was an unknown quantity. The visible supply in 1907 was 93,000 barrels, the visible supply in 1908, April 1st, was 102,000 barrels. The visible supply on the 1st of last April, during which time there had been very great trade depression and a full production, the visible supply had naturally increased, and it reached the extent of 130,000 barrels; in other words in the four years, the period that I have recited, the visible supply four years ago was 65,000 barrels, the visible supply of the world and in last April was 130,000 barrels, in other words had doubled, showing conclusively that the production had been in excess of the demand.

Q. Has the American Naval Stores Company ever speculated in turpentine?

A. Speculation is rather a broad term. If a party buy with the expectation of getting a higher price, or sell with the expectation of buying cheaper, yes in both respects. That I think is common to all departments of trade and commerce. As a matter of fact
228 the speculative element enters into all of this commercial life, even including the manufacturing concerns. If by selling the turpentine marked short you mean selling more than we had, we have, with some mitigating circumstances, or perhaps I might say explanatory. We have sometimes had more turpentine sold than we had in hand, but the real conditions are that the American Naval Stores Company is always long of the market, which is explained in this way, that while their temporary position as regards the stock on hand and the number of outstanding contracts may go to show that we have sold ten or 20,000 barrels more than we have, at the same time by virtue of these contracts which we are enforcing against the Consolidated Naval Stores Company, and others, including the Peninsular, the Downing Co. of Brunswick, and J. P. Williams Co., the Union Naval Stores Co., we are committed to take as produced and tendered on the markets each day's receipts for the year, and I imagine in a general way that the amount of turpentine under contract to the

American is something like 200,000 barrels. Therefore we are to that extent long of the market rather than short. I am not aware that the American Naval Stores Company has driven any competitors out of business. I have been informed recently during this trial that one competitive company has retired from business, the Patterson Export Company, though I think I have never yet heard of any department of trade or commerce in which for some reason some concern did not meet with non-success. I have not been a party to any plan or scheme to drive them out of business. And in that connection I might call your attention or the attention of the jury, to one fact that seems to have escaped gentlemen in this, in the criticisms which have been made against my company very frequently and very drastically, I think it should be borne in mind that the Patterson-Downing Co., the S. P. Shotton Co., and the Antwerp Naval Stores Co., the three companies which have gone to constitute the American Naval Stores Company, have been in this business for periods ranging from a minimum of 28 years to to a maximum of 45 years, during which time they have their construction, and have brought to themselves a large custom, and a greater number of dealers and competitive concerns now in existence have attacked our own customers, and as a natural effect their only way of securing the business of these customers, was by underselling the American Naval Stores Company. So that, so far from attacking competition, competition has attacked us. I do not think that the

229 charge of manipulating the market here in Savannah could have been serious; the facts are quite the contrary. At no time has the American Naval Stores Company ever manipulated the market; that is a fact to my certain knowledge. I go further and say that the market has been manipulated on several occasions during the life of the America, but never by the American. By manipulating the market I understand establishing it upon an artificial basis not warranted by conditions. I know of instances of the manipulation by other dealers here, and can give you in a general way. My company handles a large amount of turpentine and rosin. In reference to complaints from people who have bought turpentine and rosin from us, in view to the volume of the business and the number of the complaints, I think that perhaps the complaint department is almost without employment. I suppose that there is no business of the magnitude of ours in the country or in the world which is freer from complaints from customers than is my own company. That complaints come is inevitable, but sometimes just and sometimes unjust. When we are not heavily undersold we retain our customers; I think that the preference lies with us, that is my judgment and my experience. I think it is because of the absolute knowledge of the customers that our contracts will be executed; there is an element of uncertainty in the matter of other concerns. I differ with the statement that when Savannah goes up the world does, and when Savannah goes down the world does. Savannah often goes up and is not followed by the world. It would be a matter of conjecture rather than of absolute fact as to the amount of business done by the American Naval Stores Company

as compared with the aggregate of the business done by the three companies that made up the American. It might be well to take the year 1908, which we have had particular reference to with regard to crop, as a basis. The business in rosin during that year done by the American Naval Stores Company was 58 per cent. of the total crop; the business in turpentine was 42 per cent. of the total crop. But I should say that five years ago the three companies which now go to form the American Naval Stores Co., would have done, or did do, over twenty per cent. more business than that. I think that is a very moderate estimate. During 1907 we handled 284,000 barrels of turpentine, which is 42 per cent. of the total crop of 683,616 barrels, and of rosin, of which there are about three to three and one-half barrels to one of turpentine, we handled 1,325,000 barrels, which is about 58 per cent. I know nothing whatever of coercing factors like the West, Flynn Harris Co., and the Consolidated Naval Stores Company to entering into contracts which have been

230 produced in court. I was present at the making of those contracts. The Consolidated Naval Stores contract was originally entered into by the Patterson Downing Co., and the S. P. Shotter Co. The only negotiation for the provision of that contract was at that time it was following upon the cancelation of the contract that the Consolidated — at that time with the Naval Stores Export Co., which was unable to fulfill the requirements of the contract any longer. That being the case, we were requested by the officers of the Consolidated Naval Stores to assume the contract in some form. Mr. W. C. Powell at that time was president. They did not ask us to assume that, because it was an impossible contract, but they asked us to make a contract with them, the one which was made and the one that has been introduced in evidence. I might say that Mr. W. C. Powell urged us to do it. I have no recollection of ever having had any the slightest allusion to the contract with Mr. Coachman. The contract with the West, Flynn, Harris Co., was requested by them, it was made at their request. To my knowledge neither I nor my company suggested the making of them in any way, or request them to make it; I have no reason to believe it was done by any one. I had an interview with Mr. West relative to the making of the contract. The original negotiation was I think with Mr. Shotter, and they reached a tentative agreement which was referred to me, and I had the final conversation. As has been stated to the jury before, there was a demur on the part of these gentlemen to paying the storage charges on such of their receipts as originated along the river; but we took the position that we could not in the first place differentiate with them as against others, and in the second place that it was a part of our policies to see that so far as it was possible that the rosin that we handled should be handled on our premises, rosin and turpentine, in order that we might enjoy the revenue instead of paying the revenue to an outside concern. I mean rosin bought in Jacksonville, handled on the premises of the National Transportation & Terminal Co. The charge of \$400 was suggested by Mr. Harris I believe to be the approximate amount, instead of paying so much per barrel, as the receipts month by

month, that he would prefer, for what reason I do not know, to pay a lump sum on an estimated quantity. That lump sum we agreed to according to his estimate. The consideration for that, or why we made such a charge, was in order that we might secure the revenue on which we thought we were entitled for our terminals. We thought we were entitled to it because those expensive terminals required a revenue for their maintenance in the first place, and in the
231 second place we have likewise a transfer charge from Jacksonville to Fernandina for a large portion of our receipts there at Jacksonville, for all the receipts which we export, and that is the expense which we wished to offset in some measure by our terminal receipts.

Q. You are charged here in connection with the conspiracy, one of the means that you were to use is thus stated, "by purchasing thereafter at divers times a large part of its supplies the American at various ports known as closed ports, and with a deliberate intent and purpose of depressing the market, refrained from purchasing any appreciable part of its supplies of naval stores in the Savannah market when those purchases, if made, would tend to strengthen prices and market therefor, said Savannah market being the basic or primary market in the United States, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Gulfport and Mobile on a basis of the market at Savannah," what have you got to say to that?

A. I have got to say that very often we didn't buy turpentine in Savannah when we didn't want it. We always bought turpentine in Savannah when we did and if we could. In regard to closed ports, and our buying and not buying, as to what we did, and why we did it, I think it would be obvious to the jury and the Court that in the ordinary course of business only certain quantities of rosin or turpentine are required for current demands, and if during any period to which the indictment refers we abstained from buying in Savannah, either rosin or turpentine, it was for the good and sufficient reason that under the contracts that we had where we were enforced buyers whether or not, that we were receiving at the closed ports all of the rosin and turpentine that was necessary for our daily and weekly requirements. That being the case there was no occasion or no reason of any sort why we should be compelled to buy in the market here.

Q. It is charged in the bill of particulars that the competitors that you hurt by manipulating the market and buying sometimes and not buying sometimes were the J. R. Saunders Co., the John A. Casey Co. Take the J. R. Saunders Co.

A. The demise of the J. R. Saunders Co., was due to a more powerful interest than ours. Mr. J. R. Saunders died, and his business was liquidated.

That was a few months ago. I did not attempt to run them out of business. I am unable to enlighten the jury as to John A. Casey Co., of New York, the other party specified; we made no attempt to run them out of business; on the contrary we enjoyed the
232 relationship of very friendly competitors. I should be very glad to see them go out of business; they are still active com-

petitors. We have not hurt them in any way that I know of except as every competitor might hurt another one; I think we have inflicted mutual hurts. I know of no way in which we affected the business of Jas. Corner & Sons, who are specified; we have no relations with them; they are handlers of turpentine; we do not sell to them at all, I would be very glad, but there is no boycott, they are competitors.

Q. The Patterson Export Co. is the only other dealer who is alleged to have been hurt by your nefarious conduct. How about the Patterson Export Company?

A. I know very little of their business; in fact I am so unfamiliar with it that I could not answer that question intelligently.

We have never tried to crush them or to run them out of business, anything of that sort. I have never, as stated in the bill of particulars, diverted naval stores from the ports of Fernandina and Jacksonville, Fla., and Brunswick to the port of Savannah. Ordinary business reasons that might arise from day to day have prompted my conduct and policy in regard to buying from Savannah or Jacksonville, or any other place. I might say, if I am permitted to do so, that I have been asked two questions which seem to come from different roots; the one is if and why we diverted receipts to Savannah, and on the other hand if and why we refused to buy in Savannah. I do not see that those two can be reconciled. Still I will probably know later.

Q. How about this charge: I do not recall any evidence on the point, but there is a charge here that you did sometimes postpone deliveries, and pay bonuses in order to restrain trade or monopolize it, what have you got to say to that?

A. I think that is very likely to happen.

I mean that we paid for an extension of contracts, if for any reason it was inconvenient; that has been my course in business for the last 25 years. I often did that before I ever became connected with the American. The only thing I know about the specification in the indictment, which is with the Lilly Varnish Co., is the evidence of Mr. Lilly himself; I had never heard of it before, but from his evidence it would seem that it was an unfortunate delay.

With respect to tentative offers, I do not know of any offers made at any time by any agent or representatives of our company, that it was not intended to keep in good faith. With reference to the charge that in November and December, 1906, that our company at Philadelphia and Newark made sales of spirits of turpentine below the cost of production, I have no means of knowing whether the sales were made or not at any price.

Cross-examination:

I am president of the American Naval Stores Co. of West Virginia, and also president of the American Naval Stores Co. of New York. I have no official connection with the National Transportation & Terminal Company. As president, my duties were to formulate market policies, and policies as to contracts of various kinds. As president I exercise a general oversight over the business of the

company; and in a general way had knowledge of our stock in hand at different places.

Direct examination resumed:

In reference to a quantity of turpentine called the "Toomer turpentine" in a letter that Mr. Boardman had, my recollection is that on one occasion we were requested by the holders of the turpentine to negotiate for it, and did do so. They were Mr. W. C. Powell, the president of the Consolidated Naval Stores Co., who controlled a quantity, I think, of about six thousand barrels of that particular speculative holding. The sale was agreed to by Mr. Powell at the price, 43 cents is my recollection, and Mr. Powell was in Savannah, had come as I recollect it entirely on his own initiative, not solicited to do so, and could not get the order for formal transfer until he had returned to Jacksonville. The sale, however, was not confirmed. We were informed that strong objection had been interposed as to the sale of that turpentine, and that if we undertook to remove it we would be served with a legal process of some sort, and as we were not particularly anxious to buy turpentine, and certainly were not anxious to buy a lawsuit, we let the transaction lapse. Turpentine afterwards advanced and declined. I do not know what it was worth when it was taken over in liquidation, I do not know when it was taken over. I don't know that my company encouraged the suggestion made in this letter from Mr. Boardman as coming from Mr. Coachman so to fix it that when the Toomer stuff was sold there would be no equity left in it for Mr. Toomer or his company; we never encouraged it because there was never any other negotiation that was reasonably likely to be successful, either on the part of the buyer or the seller. But I may say that in the event of the purchase of that turpentine by our company it would have
234 been on the merits of the turpentine and the position of the market without any reference to the Naval Stores Export Co., as to whether it was profitable to them, or a heavy loss to them. My recollection as to that particular sale of the turpentine, which was not confirmed, is that it was about November, 1907, I do not declare that to be a fact, but that is as my memory serves me. I am clear that it was some months before the indictment, which was April 11, 1908.

Cross-examination continued:

I kept informed, as president of the company, in a general way as to stocks on hand of our company, and also in a general way as to the stock of particular grades on hand in particular places. The office, the American Naval Stores Co. received reports from every place where we had goods on storage; I very rarely went over them. I was not informed in a general way as to how much of one grade we had in Brooklyn, and how much of another grade we had in Brooklyn; I rarely ever went over that, that was a department that was not within my ken, and did not demand my attention. I would not be informed if stocks went on under one grade and were sold under another.

Q. Wouldn't you make some inquiry as to where those profits came from?

A. What profits?

Any profit that was made from buying under one grade and selling under another could only be ascertained by me as the result of the year's business; I would not be informed. I suppose I would be, I should be informed, yes, it was my duty to be informed of any wrong doing or substitution of grades and the making of money by illegal practices. It is quite correct that these gentlemen, the West Flynn Harris people, solicited a contract from us. I do not know Mr. Moller had requested them to enter into a contract prior to that. I kept posted as to the general market policy of our company. Prior to the entering into of that contract we refused to bid from the West Flynn Harris Co. because we were deprived of a revenue to which we thought we were entitled. I cannot answer the question why we refused to bid for them when they had stocks in open market here in Savannah; I do not know that I was here at the time of that non-bidding. Our company refused to bid from them for thirteen months in Jacksonville for the reason stated, that we had no revenue that we thought we were entitled to. We thought we were entitled to a revenue on all the business that we handled, I think that is the natural deduction.

235 Q. You thought you were entitled to this additional revenue, storage charges?

A. Yes, this necessary revenue.

I have no connection with the National Transportation & Terminal Company. The American of West Virginia owned all the stock of the National Transportation & Terminal Company of New Jersey. The New York American owns the stock of the New York National Transportation & Terminal Company, and the West Virginia Company owns the stock of the New York American. In its last analysis any revenue derived from these terminals would go to the American Naval Stores Company of West Virginia. We would not buy unless we could get this storage revenue, and our refusal to bid was not for the purpose of forcing the goods upon that terminal. It was for the purpose of forcing nothing; it was quite competent for us to buy without anything from West Flynn Harris Co. all the rosin and turpentine that was necessary for the conduct of our business, but we were very glad to get that revenue for purposes which you can readily understand, I think, and when they said that they were willing to give us that revenue we declared that we were very willing to give them the benefit of our purchasing power whenever it was to be administered. We gave them practically the same contracts that we had with all others. We have contracts with the Consolidated Naval Stores Company, the J. P. Williams Company and the Peninsular Naval Stores Company. (Witness hands to counsel list of competitors referred to on direct examination.) I think Walter Surridge of New York was in business when the American organized. I am not sure. I do not know where Surridge purchases most of his supplies from, nor where Thomas Seeley of New York purchases most of his. I do not know where C. B. Turton Co. purchase most of their

supplies; I know in a general way that they purchase in Jacksonville and Savannah from our company; the same may be said of Seeley. I do know they buy a portion of their supplies from us. I know where the John A. Casey purchase some of their supplies; I do not know what part they purchase from us. Toler & Hart purchase none from us. Where they get their supplies from I do not know except in a general way. Daley & Montgomery, of New York City, are competitors, too, because they entered the field against us; they are receivers, factors, commission merchants, and I think get their supplies chiefly from Savannah and Jacksonville. F. S. Clark is a moderate dealer in naval stores; I do not know where he gets his supplies; and the same answer applies to F. W. Blossom.

236 Dunlap Slack Company, Philadelphia, buy their supplies from the prime markets, I think—probably some from us, and some from others. The same as to Loos & Dilworth, Philadelphia. Geo. L. Morton & Co. are small dealers in Wilmington, N. C. W. M. Bird & Co., of Charleston, S. C., are commission merchants, and also sellers, dealers. A. L. Chapeau is a broker in Savannah. I do not know whether you would style James Farie, Jr., a broker or a merchant; I would rather incline to the latter idea. The London & Savannah Naval Stores Company are distributors. The Patterson Export Company is the company which we hear has gone out of business. E. R. Middleton is the gentleman who gave his remarkable testimony. Jas. Corner & Son of Baltimore, Md., are dealers, merchants. I am told Farie represents them, very likely has a joint account with them, I do not know anything about that. Mr. Middleton said he represented the public, any one from whom he could make a commission. I am told that he buys very largely, or did, for the firm of Bartels, of Germany, represented by a Mr. Benkert. I heard, but don't know, that Bartels is out of business; it caused me no surprise. J. R. Walsh is a broker and I believe a dealer; I think his exports are not large. Standard Oil Company of Louisville. In a general way I keep fairly well posted with the Savannah market and the purchases at Savannah. It is quite possibly true, but I do not know, that from May, 1907, until March, 1908, the Standard Oil Company did not buy a barrel on the Savannah market; it made no impression whatever on me. It may be true that at the same time the Standard Oil Company were taking large commitments from your company, they made very considerable purchases from my company. They purchased through the New York Company, they purchased for their export business in New York. For their domestic business I think their contract during that period was with the J. R. Saunders Co. and not with the American or the Union. We had no contract with them that I know of; I do not recall any contract during that period. I do not know whether they purchased from my company or any other company except the J. R. Saunders Company for the Middle West; I do not know that. Boume & Co. is one of the new companies. I haven't the slightest idea as to their capital; their business is very moderate. Atlantic Naval Stores Company of Jacksonville is the company Mr. Elson just testified about. J. R. Saunders Company of Pensacola has gone out of business, being liqui-

dated at the death of Mr. Saunders, and taken over by the J. P. Williams Co. They were succeeded as a dealing company by the Saunders Company and other companies. The Williams Co. is
237 the company with which we have one of these contracts. I do not know how much business Jones & Pickett of New Orleans do. The Central Commercial Co. of Chicago, Ill., are general distributors, and I think get their supplies from the interior Gulf States. I think C. J. Peterson & Co. of Chicago are small distributors. I know nothing personally about Hosea & Co. of Cincinnati, and nothing personally about Freedom Oil Works of Freedom, Penn. I really do not know whether they compete with us in the market here at all. I know very little about the Fernwood Lumber Company of Fernwood, Ala. I know nothing about Brooks-Scanlon Co. of Kenwood, La., except that they are purchasers and dealers. Mr. Pfau is the head of the International Naval Stores Company of Savannah; I have not observed their doing a very large business here. I think the Jackson Lumber Co. of Lockhart, Ala., are producers, and I dare say market all of their product; we meet and feel their competition in the West. Taylor & Loewenstein Co. of Mobile, Ala., are merchants. M. P. Daly of New Orleans is a trader; I do not know how long he has been engaged in it; a very short time, I think; he is one of those I put at the bottom, since the organization of the American. I do not know that I have heard of the Cardina Pine Products Co. of Cleveland, Ohio; this memorandum was put down at my instruction as to who are dealing in these articles. M. Larenden of New York City is a distributor, and buys a part of his supplies from us, I do not know what portion. W. J. Keenan of Columbia, S. C., is a buyer and seller of turpentine and rosin, and likewise A. H. Slocumb of Fayetteville, N. C. I cannot from any statistics I have formulate a table which will show anything like the proportion of the crop handled by any one of these competitors or all of them; I think that is a mathematical calculation; if I have statistics which show how much we handle, it is natural that the others handle the balance. The figures that I had about the proportion that we handled were made up for the year 1907, referring in this instance to the calendar year because that was the period during which the Government took its statistics. As a rule I refer the other way to the crop year; I should call the crop year from April 1st, 1907, to March 31, 1908. I do not know just what means the Government pursued to get those statistics; there was an appropriation passed and a commission appointed. I do not know at what time the men came around. To my knowledge they did not get a large part of their statistics from our company; never heard of that. I think
238 Mr. La Fontennes was in charge of the Government statistics; I never met him; I do not know whether he called on us for statistics or not, or any of our representatives. During the calendar year ending December 31, 1907, the production of turpentine was 683,000 and odd barrels, of which our company handled 284,000 barrels, including everything that both the American Naval Stores Companies handled; I included nothing of the New Orleans Naval Stores Company except the purchases we made from them.

The Union Naval Stores Company did no marketing except through our company, and that is included. We handled 42 per cent of the turpentine, and 58 per cent of the rosin. The quantity of rosin is the Government's figure, I am confining myself entirely to that. 62,000 barrels was the estimated stock on hand on the first of April, 1906. I arrive at that estimated stock on hand by counting the stocks of the various ports of the world, getting those stocks from the various ports of the world through our various agencies. In America, outside of Savannah, there is no accurate count kept of the stock on hand in any port. We had the method of arriving at the stock which our competitors had by knowing the receipts and the exports, and deducting the difference. In places where there were no accurate statistics as to the receipts and exports we arrived at it by a close estimate, getting those estimates from report of our agent at each particular point. I do not know how much our company carried over April 1st, 1906, I did not take that into my calculation, these are the general figures which concern the industry. I do not know how much our company carried over in April, 1907; I do not recall definitely that we carried any appreciable amount of stock over in either of those years. Neither I nor my company would have any objection to a competitor or a producer or anyone else carrying over 9000 barrels in its own tanks. I have never known of any effort that my company made to "shake out" that turpentine in those tanks; any effort of that sort I may say was without my knowledge or consent. I don't know that my company invariably refused to consider the purchase of any tanks of spirits or turpentine. In fact, I may say that I know they did not; as a matter of fact we have bought a great deal of turpentine. I do not know, and never heard, that our company refused during that time to buy from Chesnutt & O'Neill some turpentine that was tanked for Mr. Oliver. I think the natural effect at any period of abnormally high prices of turpentine would be to induce buyers to hold off until normal conditions were restored; I would think so. The reason I had for refraining from purchasing here and the reason for at the same time simultaneously purchasing in the closed ports I think might be obvious to you and I am sure it will be to the jury. To make a little illustration, if you have three suits of winter clothes and that is sufficient to carry you through the winter, or maybe six, let us say, would you want to buy nine, or would you consent to buy nine? I will say that we did not buy the turpentine because our outport receipts were sufficient to supply our requirements; that is one reason. It is quite true that we bought at these closed ports because we were required by our contracts to buy them. There is nothing in the contract shown me which requires us to buy if we do not want to, that is not a closed port; there is an open market. We have similar contracts with other people which require us to buy nothing unless we want to. Under the contract with the Consolidated we are enforced buyers, under this provision: "The Consolidated and associates respectively agree to sell and deliver to Patterson-Shotter all the receipts of turpentine and rosin which the Consolidated and its associates respectively may receive by rail, either directly or indirectly, at the port of Pensacola

in the State of Florida, and Patterson-Shotter agree to buy and accept said receipts and tender and pay for at the following prices, namely: "Pensacola is all the port we had to buy in that contract; fortunately we were not required to buy at Jacksonville under it. If for any reason the volume of receipts at Savannah during any given period were increased, and during the same period the American Naval Stores Company refrained from buying in Savannah, the effect that would have upon the Savannah market depends on what would have been done by other dealers here; that of course is an unknown quantity to me. I do not know what effect our staying out would have, at the same time it was increasing. I am thoroughly posted with my business. Answering your question frankly, I do not know what effect it would have on it. If you ask me for an expression of opinion that is another thing. I think the result would be that the market would go lower. That is an expression of opinion: that is not an expression of fact. I give you my opinion as I am whether thoroughly well posted or otherwise. Referring to statement of the purchases for the month of March, 1908, in the ports of Jacksonville, Fernandina, and Port Tampa, Fla., and the proportion bought by the American Naval Stores Company and also the purchases at Savannah for the month and assuming it to be correct, the receipts of turpentine in Jacksonville were 5274 barrels, of which we purchased 4289, or 80 per cent; and in Savannah the receipts were 5,767, out of which the American Naval Stores Company purchased 240 208, the percentage being infinitesimal. As to what would be the natural normal effect of that upon the market price in Savannah I suppose—of course this is an expression of opinion, I told you just now that I did not know, but I can express the opinion that as the Savannah market at that time was dominated by a speculative movement in support of a speculative operation which had been unsuccessful, that our appearance in the Savannah market would have put the Savannah market up possibly to a dollar a gallon, that is if we had bought that quantity. Mr. Benkert was a contributor to the speculative movement I refer to; I think, but am not sure; that he came here in January. I cannot say that he was here either in January or February, but Mr. Middleton was here all the time. Our refraining from trading was going on in January and February during the speculative period. Permit me to amend that word; the manipulated period, not the speculative. The speculation had preceded the manipulation. I call manipulation the bringing about of unnatural prices, the market going either up or down, varying from the law of supply and demand, getting out of plumb. I do not know that Mr. Benkert did not come here until March, I have never seen him; I know that his operations in connection with others put up the market for a short time. I think that movement lasted about fifteen days in March; that condition would not affect the market for the two preceding months. I should say that the normal weekly demand for turpentine for the world would be a little over 10,000 barrels a week.

Q. Has it or has it not been the policy of your company in the spring, particularly in the year 1907, early in the season to put the

Savannah market up and then sell the contracts for future delivery, and then while filling the contracts ignore the Savannah market and take your requirements for these contracts at the closed ports at prices ranging from four cents per gallon to twenty cents per gallon less than your contract prices?

A. Our policy, is that the charge?

Our policy is to buy as cheaply as we can and sell as dearly as we can.

Q. Do you or do you not run the market up in the early part of the season when you are making your contracts and run it down when you are filling your contracts?

A. What do you mean by running the market; let me get your meaning first, what do you mean by running the market down? It is always easy to run one up, but by running it down?

Q. By bidding it down?

A. Oh, by bidding it down.

241 Q. Yes, underbidding it?

A. I think I get your idea now. The policy of my company has been to make its contracts at as high a price as possible.

We make contracts each day of the year; I cannot say that we make them principally in the early part of the year. I have not the slightest recollection of the Consolidated Naval Stores Company declining to pay this amount for storage that was given to our company in lieu of storage or transfer charges; I do not recall the slightest trouble about it. I do not know whether our company refrained from buying from them until they did comply with it; I may say that when Mr. Coachman on the stand made some reference, when he delineated the meaning of the particulars, I wondered what he referred to, I had not the slightest idea.

I have no recollection of any conference here, after the contract was made, between me and Mr. Bullard, Mr. Powell and Mr. H. L. Covington, on account of some disagreement about the payments which are sometimes referred to in lieu of storage and sometimes in lieu of transfer charges. I would not say at all that they did not come up here and protest, but I think I would remember if they had.

Q. You would not say that one of them came up here and protested against your refusing to buy?

A. I simply say I have no recollection of any proceeding, any protest of any sort having been made.

Q. Will you be kind enough to tell us, if you know, what connection with the American Naval Stores Co. business in New York City the word "otter" means, code word, or something of that sort?

A. Yes.

Question by counsel for defendants:

Has it ever been used in the American business?

A. Yes.

Question by counsel for Government:

Will you be kind enough to tell us what it means?

A. Yes, that is a question which I asked myself, feeling the same curiosity that you do at the formation of the American, and I was informed that the word was used in connection with some customers whose requirements were not so rigid as those of the bulk of the business, customers who paid no attention to the marks on the barrels, but simply contented themselves with the contents. I further asked the question as to whether in a shipment of those contracts the grade mark was altered. I was told positively not.

Q. But the word "otter" in connection with the shipment meant that from previous experience with these parties that you designated as "otter" that the purchaser would not raise any question about the grades, didn't it?

A. That the purchaser was satisfied with the contents of the barrel that he received upon the guarantee of our company.

Redirect examination:

That word was not in the code, and that is the reason that I asked the question what it meant. It has never been in the code of the American.

Q. The code that it was in of some preceding company, were there code words as to other things?

A. I have never seen the code.

There are between 55 and 60 stockholders of the American Naval Stores Company, the one that has been indicted. The total number of shares is 21,200. S. P. Shotter is the largest stockholder, owning 4476 shares, or about 20 per cent. E. S. Nash 3362 shares, about 17 per cent. Geo. M. Boardman, 668 shares. I think Mr. Boardman has forgotten the transfer of a few shares. This does not quite agree with his statement. He thought he owned 700 shares. He owns slightly less than three per cent. Robert W. Patterson, who is the retired partner of my old firm of Patterson Downing Co., 750 shares, practically three per cent. Mr. C. Downing of Brunswick, 700 shares, about the same per cent; Mr. Patterson's is about three and one-half per cent. perhaps. Then here are Mr. H. Jensen, W. L'Engle, Mr. Chauncey W. Dill, Mr. Henry Schroeder, Mr. J. E. Driscoll, H. Weibert, Geo. W. Owens, trustee; Geo. H. Stevens, Carl Moller, Jos. C. Nash, C. J. De Loach, A. W. Carmiachae, Mr. E. S. Trosdal, W. H. Crawford, H. H. Bruen, Mr. U. M. Robinson, O. T. Frick, Mrs. E. D. Nightingale, Mrs. C. McD. Myers, Wilson-Paterson Co., John J. Conoly, J. E. Sybrandt, Harry Short, W. C. Merritt, Percy Ketchum, J. C. Butner, Geo. L. Lappington, T. T. Myers, H. T. West; S. S. Thomas, J. F. C. Myers, trustee; Mrs. Catherine W. Boardman. Those are all the American stockholders. There are foreign stockholders. There are 5000 shares held abroad made by the transfer of the Antwerp Naval Stores Company.

Jacksonville is not a closed port, it is an open market.

243 S. P. SHOTTER, one of the Defendants, sworn in his own behalf.

Direct examination :

I live in Savannah, Ga. I have lived here for 30 years, living before that in Wilmington, N. C. I have been in the naval stores business for 35 years, and am familiar with it. I have been with the American Naval Stores Company since it began business, December 1, 1906, and am chairman of the Board of Directors. Generally my duties have been to look after its financial affairs, and in connection with its general construction.

With regard to the Consolidated contract, that is the contract made by the S. P. Shotter Co. and the Patterson Downing Co. with the Consolidated Naval Stores Co., I believe it was made December 7, 1905. At the time it was discussed it was in my private office, the American Naval Stores offices; there were present W. F. Coachman, vice president of the Consolidated; Mr. W. C. Powell, the president of the Consolidated; Mr. B. F. Bullard and Mr. H. L. Covington, also vice presidents of the Consolidated, and Mr. J. R. Saunders, a director; I don't know whether he was a vice president or not, but he was connected with the Consolidated Naval Stores Company. The contract was very carefully considered and discussed. There was one clause in it which Mr. Powell demurred at to some extent, and we withdrew it. With regard to the clause relative to the storing of the Consolidated Naval Stores Company's receipts on the yards of the National Transportation & Terminal Co. there was no objection made by any one; it was in fact thoroughly understood, so far as I know, and in the absence of any objection, it was thoroughly understood by all the gentlemen present, who were of the Consolidated Naval Stores Co., that it was a requisite to our buying naval stores in Jacksonville that the rosin and turpentine should be put upon those yards which were the property, through the Terminal Company, of the American Naval Stores Co. of West Virginia. It was no new subject; no one knew better than Walter F. Coachman our reasons for this, and the necessity for it; as he was exceedingly anxious, perhaps more in the years gone by, had been more anxious to make a naval stores market of the town of Jacksonville, and it was largely due to him and his efforts that the American Naval Stores Company was there—this was the Shotter Company—that the Shotter Company was there at all. Those yards in fact that we had were bought by us

244 from Mr. Coachman when he was president of the Florida Naval Stores or Commission Company—some name of that description—and Mr. Coachman realized fully that there was a profit obtainable from the storage of naval stores, and the importance to an exporter of having the rosin and turpentine on their own yard as storing it from month to month with the railroad company. The Atlantic Coast Line in Jacksonville charged, I believe, three cents per barrel and four cents per barrel on rosin and turpentine, respectively, for initial storage. That was for 30 days. After 30 days the buyer would pay renewal storage, and again at the end of 30

days another storage. Of course, one will readily understand that for the American Naval Stores Co., to have the revenue of three cents per barrel on rosin, which is the initial storage, was a good thing to have, and that it was a good thing to store your own property on your own ground, and save the payment of three cents per barrel month by month, to have carried the rosin and turpentine on your own yards instead of that of a railroad company. It was explained carefully before this meeting, and was thoroughly known, I think, by all the gentlemen present, that the storage on our yards was the consideration which we received for buying rosin in the town of Jacksonville. I would like to explain carefully that; that the town of Jacksonville, while a very pretty town, there is no sufficient water there in the river to admit of loading steamers for foreign transportation, transportation abroad; there has been one steamer, I have heard, loaded there, or attempted to load, and met with great difficulties, but only one so far as I know with naval stores. But we had found it necessary to transport the rosin and turpentine from Jacksonville to Fernandina, quite a distance, to get to deep water at Fernandina, we had constructed wharves for the convenience of this business, and it was the best that we could do. This transportation from Jacksonville to Fernandina cost us considerable, and it was necessary if we were to put Jacksonville on anything like the same footing with the Savannah market, it was necessary for us to have something in the way of compensation, and we got this compensation through the storage of these naval stores on our yards originally by the factor and afterwards of the saving which we made in the way I have just mentioned. Every officer of the Consolidated knew this, and appreciated it; as I say there was not the slightest objection made to this clause. After withdrawing one small feature of the contract at the request of Mr. Powell the contract was signed. It was signed in the presence of Walter F. Coachman, who sat opposite to my desk, across
245 from me, and Mr. Coachman expressed himself as not only gratified but highly pleased with the signing of the contract. I never heard, until I heard something here in this courthouse, that he had any objection to the contract; it never came to my attention; I heard that he said something to Mr. Boardman, I was abroad at that time, and it did not come to my attention until, as I say, this matter came up here; I was amazed to hear it.

The \$400 item is not in the Consolidated. The Consolidated Naval Stores Co. agreed in this contract to deposit on our yards all the receipts of naval stores which they should receive in Jacksonville, everything, which included their receipts at the Atlantic Coast Line, these receipts being rosin and turpentine that came down the St. Johns river by boat; and I never heard, as I say, I presume they had to switch them up to our yard and pay us storage: what they paid for it, and what their arrangements with the Atlantic Coast Line were I do not know. We then made a similar contract with J. P. Williams Co. and a similar contract with the Peninsular Naval Stores Company.

The West Flynn Harris Co. wanted us to buy their receipts in

Jacksonville, and we were willing to do it, told them so, but we said "We do not want to buy them from you on the Atlantic Coast Line yards; we do not want to pay renewal storage, but we want you to patronize us." They wanted us to patronize them in Jacksonville, and we said we would do it if they would patronize us, and we thought it fair and reasonable; and they did not agree with that for some time, and so, as we needed the revenue as part compensation for the expense of the transportation of the naval stores from Jacksonville to Fernandina we did not buy from them. It was not as good—in the first place there is a good deal of hardship connected with the business that has to go from one place to another; we had rather have all of our business come here to Savannah, where the shipping facilities are the best, or to go to the next adjoining port of Brunswick, where there is plenty of water, deep water, all the facilities are there, were all right there, had been there for many years, but to go to a new town and buy an expensive piece of property, a place where there was not sufficient water to bring in a steamer to load, or on the other hand transport—I do not know how many miles it is—from Jacksonville to Fernandina, but quite a distance, to build wharves there and all those expenses, the establishment of offices that would be otherwise unnecessary; all this means expense, risk and time. But we did it, but we thought

246 we ought to have something for it, and we thought it was unreasonable for West Flynn Harris Co. to ask us to buy and patronize them when they would not patronize our terminal at all. I heard Mr. West say that he came twice to Savannah. I have no particular recollection of his first visit, but I do remember a visit from Mr. Flynn, he came in perhaps once, perhaps twice, I think when he came to Savannah, sometimes he would come in to see me; I knew him quite well, and I think he spoke of that subject; but any way Mr. West and Mr. Harris came to our office, I think, it was the 7th day of June, 1907, and expressed a desire to make a contract with us. Now, Mr. West says that he did not want to make a contract at all; I didn't know it, he didn't tell me so, and I really don't know why he came to the office, he knew I would not make one, would not do anything with him without such a contract or arrangement, and I assume that he did want to. We had quite a long discussion that morning, principally on this point of his water receipts in the St. Johns river. Mr. West sat in Mr. Nash's office, which adjoins mine, the most of the time, if not altogether; Mr. Harris was in my office, and I think Mr. Harris did the most of the negotiating with me, and he, as also probably Mr. West, did not like the clause by which it would be necessary for them to put the Seaboard Air Line receipts at Fernandina—I will mention that it did not cost any more, the rate of freight was no more to Fernandina than to Jacksonville, they would have to pay no more freight. Our wharves and the shipping interests, foreign shipments had to be made from Fernandina, and you will understand all that we asked them in connection with putting the receipts at Fernandina was that we would ask the payment of freight from Jacksonville to Fernandina, that is put at our wharves without any additional ex-

pense whatever to them. They said, however, that would require them to keep an inspector at Fernandina, and they also, I think, they called the attention to the fact that we were not at that time insisting upon this, or calling for the performance of this feature of the contracts with the Williams Company and the others and the Consolidated in this respect, and we told them that of course we did not want, we did not have any idea of asking them to do anything more than we were asking from other factors, and that unless that particular clause was required of the other factors we certainly would not require it of them. So with that they were satisfied. But they dwelt to a considerable length upon our requiring that the Coast Line receipts from the river, or rather the river receipts that were landed on the Coast Line, should be transferred and
247 put on our yard. I told them, told Mr. Harris, that I would prefer to make no contract with them at all, if that was necessary, that in good faith we had made contracts with the Consolidated Naval Stores Co., the Williams Co. and the Peninsular Naval Stores Co. in this same way, and that it was the policy of our business to treat every one alike, that we could not and would not discriminate in their favor; that we felt under a moral obligation to these other companies to do no better by one than by another; that it was with that understanding that we had made the arrangement with the Consolidated and with these others, and we would rather just simply do nothing, we wanted to buy from the West Flynn Harris Co., we had nothing personal with them, it was all a matter of dollars and cents, the matter of getting compensation or something as an inducement to us as against the difficulties of doing business in Jacksonville. Finally Mr. Harris said—Mr. West was then in Mr. Nash's room—Mr. Harris said to me, Mr. West is making a very great point about this, and I wish we could find some way to get around it; would it suit you if we figure it in a lump sum what this difference would be, take this rosin on the Coast Line yards, do your switching yourself, or whatever you wish in connection with it, figure out what it would be, and how will it do for us to give it to you in a lump sum of whatever it may be. I told him it was quite immaterial to us whether we got it in two or three cents a barrel for so many barrels, or whether we got it as \$400 at one time, that that was as broad as it was long, and as long as we had carried out the feeling that we had, our determination that we would give them no preference as against their competitors, and would treat every one alike, I said that we would get away from Mr. West's prejudices or dislikes in that way, it would make no difference. So Mr. Harris talked with Mr. West, they decided that that was satisfactory, and they closed with us, except that they then made—and they went to their own office, which was in the same building, on a lower floor, to draw up the contract. We had about reached the dinner hour, and I may say that shortly after dinner Mr. Richmond, who represents them here, come up to my office and asked me something in relation to it. I do not remember now what it was, it is quite immaterial, perhaps something to know what the understanding between us was, or something. He stopped

then to rather open up the discussion on the merits of this particular clause, and as we had been what I considered rather patient in repeating to Mr. Harris again and again the necessity for our asking for this arrangement, I thought it was uncalled for that

248 Mr. Richmond should inject himself into the business, and I have no doubt I expressed some degree of emotion, and as he says was a little petulant. But we signed the contract, and I heard nothing further from West Flynn Harris that they were dissatisfied until these gentlemen were on the stand the other day. I don't know that I have anything more to say on that.

They have not kicked, and we have not kicked, everything satisfactory; I have not heard a word of dissatisfaction from them. I have heard of no scheme or plan on the part of myself and alleged co-conspirators, two corporations and five individuals besides myself, to restrain trade and to monopolize trade. I have had no understanding of any sort with them or with any of them. We have done a comparatively large business it depends upon what you compare it with; a large business in the naval stores business comparatively. We have endeavored to do a large business, and to get all the business we could legitimately and properly. I do not know anything about taking too much spirits out of the barrels at the Jacksonville yard; I have no idea [it] has been done, it never was, I don't know anything about it, it certainly would not have ever been done with my approval or consent; if it had ever been done and it should have been called to my attention I would not have permitted it a moment.

I do not really know myself of any single barrel of rosin that has ever been marked up in grade. I did hear of one lot. As soon as I heard of it I expressed my disapproval, although I did not know but what the contents may have warranted being marked up. The only other talk I have ever had on that subject with my associates has been, as I say, I have disapproved of it to them, and they agreed with me. I was going to say that I have heard of it in connection with our competitors, but disapproved of it then.

There are no inspection laws other than in Georgia or in Florida, so far as I am aware.

The American Naval Stores Company sells turpentine and rosin to varnish manufacturers, paint and oil manufacturers, wholesale druggists, and rosins to soap manufacturers and paper manufacturers. I will say we have certainly four thousand customers, may have been more. My experience has been that we rarely ever have a complaint; the extraordinary part would be the infrequency as compared with what I have heard of other business. One of the largest customers, and perhaps the largest consumer of turpentine in this country, is the Sherwin-Williams Co.; their buyer was here a few days ago, I think at the time this trial was on, and we
249 signed a contract with them for a large quantity of turpentine. In rosin Proctor & Gamble Co., whose names have been mentioned here. Murphy & Co., of Newark, N. J., are very large customers, we do a great deal of business with them. Others of our large customers are Berry Bros. of Detroit, Mich., varnish

manufacturers; Chicago Varnish Co. of Chicago, large varnish manufacturers; Fels & Co. of Philadelphia are large buyers from us; Colgate & Co. of New York City; the Glidden Varnish Co. buy some from us, but they buy more from the Standard Oil Co.; and Jas. S. Kirk & Co., soap manufacturers, have bought from me for 30 years almost uninterruptedly in the different business that I have been in and always from the American Naval Stores Co. since its organization.

I have been in no plan or scheme to hurt the J. R. Saunders Co. by selling too low or manipulating the market. I have never hurt them that I know of. Of course I suppose every time the American sell to a consumer or a dealer we must in a measure hurt a competitor that does not make it; that is the only degree of harm that we have ever done them. The same statement is correct as to the John A. Casey Co., and Jas. Corner & Son of Baltimore. We treated the Patterson Export Co. the same as we did the rest of our competitors, just simply met their prices if we could, and when they undersold us they got the business; we got the preference as a rule I think.

As to the alleged diversion from Jacksonville and other Florida ports to Savannah, it is out of our power to divert receipts; we never wanted any rosin or turpentine ourselves to go to Jacksonville; we would have preferred to see it all come here to Savannah, where there are so many transportation lines, and so much more convenient, or to Brunswick where there is deep water; but at Jacksonville the people wanted a market there; well perhaps you may say almost coerced us into going there, and so we buy some there, and some turpentine and rosin has been going there ever since, but it rests entirely with the factor or commission house or the producer as to where they ship their rosin and turpentine, and the buyer or exporter like the American Naval Stores Co., or its competitors have nothing whatever to do with it.

Of course in sitting here I have heard reference made to the statement that in March, 1908, we did not buy in Savannah to a very small extent, and bought heavily in Jacksonville, Tampa and Fernandina, Florida ports; and I have been informed by our people, our own office, where I go for information, there are several reasons. One is that we had a steamer coming into Fernandina for a large quantity of turpentine, and it was necessary
250 for us to buy turpentine at the port of Jacksonville to load it. Another reason was that the market at Savannah during the period of January, February and March 1908 was manipulated in a most extraordinary way, not by the American Naval Stores Company, we only bought two or three thousand barrels, but others. The result of the manipulation, first the month of January when it was 40 cents December 31st, and 54 about the 15th of January, an advance of 14 cents a gallon. At that time the leading conspicuous figure in the manipulation was the Patterson Export Company. We did not feel inclined to join them in such a practice, and it seemed to be a demonstration in favor of Walter F. Coachman who was running at that time for the presidency of the Consolidated

Naval Stores Co., who wanted to create an effect. That was in January. I have no recollection of February, but the month of March there was a man here from Germany by the name of Benkert; I didn't see him when he was here, but I heard of his erratic behavior. He seemed to be a manipulator, that is by a manipulator the creator of fictitious conditions in the market. He seemed to be on the bull side, and he had some support from other people, noticeably at that time by the National Tank & Transportation Co., here, which I believe is owned and controlled by the Southern Warehouse Co., which the evidence here had developed is owned by the—I don't know, I think it was the evidence that has been introduced here—by the Naval Stores Export Co., of which I undersigned a gentleman by the name of Toomer, Col. Toomer of Jacksonville, is president, or was then.

Not to my own knowledge has rosin been falsely and fraudulently raised without any reinspection; I was never in a scheme or plan to do that.

The Cincinnati yards are supplied principally from the interior of the Gulf States, the product manufactured on the lines of the Cincinnati Southern, the L. & N. Railroad, I don't think any go through to Mobile & Ohio, it is over the railroads down near and around Mobile. The Cincinnati yards are at Ludlow, Kentucky, just opposite Cincinnati on the Kentucky side of the Ohio river. There is no inspection law there at all.

On inquiry since it came up in this connection I know there was something to the effect that we would sometimes get deliveries postponed and pay bonuses, the one case mentioned being the Lilly Varnish Company; I never heard of it before the trial.

With reference to the tentative offer testified to by Mr. 251 Graves, that incident would not come within my knowledge, if there was such a thing. If you want me to answer broadly about the general subject of tentative offers I will only say that I never heard of the American Naval Stores Co., making any offer of any description that they did not live up to in good faith, or that was not bona fide.

I don't know what the cost of production of spirits of turpentine is. I may explain it would not make any difference to the American Naval Stores Co., in making its sales what the cost of production is. If we had too much turpentine, or if the market price of turpentine went below the cost of production, the American Naval Stores Co., would go on doing business just the same way; as long as it could buy below the cost of production it would sell below the cost of production, the margin of profit being there just the same.

As to at any time being in any scheme or plan of any sort to injure producers and deprive them of a living or ruin their business, I consider myself the largest producer in the United States, and I certainly would not be in any scheme that would be most injurious to myself. I say that I am the largest producer on account of my interests in factorage concerns which are also interested in producing farms. My interest in the American Naval Stores Co., is about 20 per cent.

With reference to the difference in price between I and K as noted on the blackboard by the witness Tunno, there is not always the same spread; he brought out a particular time when there was a spread as I recollect of a dollar per 280 pounds. The grades over K, being M, N, W, and WW, represent what is known as the pale rosins cut from the first year's cutting of the boxes, the virgin cut. The grades I and below, that is B, D, E, F, G, H, and I, are made from the second year boxes, third year, fourth, as long as they work, they don't work boxes very often more than four years I think, but the conditions during the past two or three years are these: The cut of the virgin boxes has been falling off, while as a result of previous years the output of second, third or third and fourth year, has been large, and even larger than the previous year. Of course now we will be getting into a shorter crop of the lower grades as a sort of inheritance of the virgin first year cut, but as it applies to the year in question where this large difference appears to obtain, \$3.50 for I, \$4.50 for K, and hence the remarkable difference between the two grades. The reason, one reason at least is, that there is very much more, a very large crop of the I and below, and a very small crop of

252 K and above; they had to split somewhere. Then the attention of the jury has been called to another reason by one of the witnesses Register, who testified that applying the difference between the grades of rosin the greatest difference in color was between I and K, and another witness testified that color represented the value of the different grades of rosin, and the most natural reason in the world is where the greatest difference in color exists there should be the greatest difference in price. That was the second reason. Then I would say that there is a very slight difference in color between H and I rosin; and if there is a considerable difference, as there is here, of 45 to 50 cents per 280 pounds, with that very slight difference in color a consumer might buy the H and neglect the I rosin; and our experience for several years has been that of all the grades of rosin the grade I is the most unsaleable. I imagine that our competitors find the same trouble. Of course I don't know their business.

My interest as a producer is more than two and one-half, and not quite three times as great as my interest as an exporter.

I know very well what the plan was approved by Mr. Coachman to which Mr. Boardman alluded; it was a plan that originated as far as I know with Mr. Barnett of Jacksonville; he called on me to explain it, and it was this: To organize a combination of the factorage houses at Savannah and Jacksonville and elsewhere. Brunswick and the Gulf States, if they could be brought in, all of the factorage houses and perhaps some of the larger operators, and to organize them, as you may say, into one company, and this organization or amalgamation of factorage houses was to constitute the American Naval Stores Co., its selling agent on commission. I was asked to consider the plan, invited to Jacksonville to listen to all of the factorage interests there, except I believe the absence of the J. P. Williams Co., and what I thought of it. I told them that at the time that I did not think it was workable, and I was very much in doubt as to its legality, but as I say it did not go any further

from me; but I understood Mr. Coachman approved of it. It meant the exclusion, the absolute exclusion of all other export houses in the business, and I did not think that that could be done.

The first time I have seen the letter that Mr. Boardman wrote to Mr. Myers, and used as a memorandum, was yesterday when I saw it at a distance. I bought once the turpentine there called the "Toomer stuff" and couldn't get delivery, bought it from W. C. Powell. He told me that Mr. Toomer would not let it be sold. I bought it at 43 cents.

253 Cross-examination:

I was engaged in the naval stores business in Wilmington, whence I came to Savannah about 30 years ago, where I have been engaged in the naval stores business, and no other. Thank you for reminding me, I was one or two years in the oil business; I also have an oil refinery out here, and raise vegetables on my farm. I am a Canadian by birth, and am a British subject. I am chairman of the board of directors of the American Naval Stores Company. It would not be strictly correct to say that I exercised a general supervision over the business; my duties are confined to special operations, and since the organization of the American Naval Stores Co., they are not as broad in general as they were when I was the chief executive office of the S. P. Shotter Co. I do not have anything very much to do with detail matters. If there is any other one man than myself who exercises more influence over the general policy of the American Naval Stores Company, it is Mr. Nash; I consider Mr. Nash the active head of the business; I do not consider myself the man, quite the contrary. I have visited pretty nearly all of the countries of Europe in connection with the business, looking after it, but have never been further west than Kansas City, in this country, and that was when I was a boy. The yards of the National Transportation & Terminal Company of New Jersey are situated in Jacksonville, Fernandina, Tampa and Pensacola. The yards of the National Transportation & Terminal Company of New York are in Brooklyn, N. Y. The American Naval Stores Company of West Virginia owns the yards at Ludlow, Ky., and in East St. Louis, and in Chicago. The American owns the stock of the American Pine Products Company, and it has a yard at Williamsburg, outside of Hamburg, not far, you can go on a tram road, or what they call in the country a street car. If my memory is correct the American owns 100 per cent of that stock. The American's European branch has one in Antwerp. The connection of what is known as the American Naval Stores Company European Branch with the American of West Virginia is just what its name says, European branch; it is not incorporated. We did not take over the Antwerp Company, whose branch name is Societe Anonyme Produit Resinol, which has liquidated or disappeared, practically the same. We just bought some of their properties, they liquidated, and Mr. Speth, who was the manager, is one of the directors, one of the executive board, and a stockholder in our company. We correspond with

Nicoll & Knight of London, England, and sell them sometimes, but I would not be sure that they buy all their stuff from us. I do not know of any buyer of theirs in any American port; and I do not think there is any for the Rosin & Turpentine Importing Company, who are distributors of rosin and turpentine in the United Kingdom of Great Britain and Ireland, taking in England, Ireland, Scotland and Wales. The American of West Virginia owns forty per cent of the stock of the Rosin & Turpentine Importing Company, not forty but thirty-seven; I could not answer in a general way how its stock is held; I don't know how much Mr. Speth owns I do not own a share personally that I am aware of. I should not think that it is approximately correct that, including the holdings of the directors or the executive board of the American, and the holdings of the American, that sixty per cent of the Peninsular Company is controlled by the American. I and my associates have never exercised any control of the Peninsular, so I don't know about it; we own 37 per cent. of the stock, and do not vote 60 per cent that I know of; I do not know how the Antwerp is voted, I never voted and never saw it voted; the holdings are in Europe, I don't know how it is held or divided, and I don't know how it is voted. The Antwerp people don't consult us as to how they do, at least I have never talked with them on the subject. I think the Union Naval Stores Company is incorporated in West Virginia too; I do not know the holdings of anybody else, my own are about 11,000 shares, and the American's 1331 out of 17,500 shares. Mr. Myers, who is connected with the American, owns stock in the Union, but I don't remember the number; I think he holds it in his own name, as well as his stock in the American of West Virginia. The American and the directors could control the policy of the Union; they control it to the extent they could change its executives if they wanted to; that would be control I think. The Union is a factorage house, and produces turpentine through partnership relations with turpentine operators on their farms. The factor practically lends the operator money to run on, and takes a mortgage or some kind of security on his plant. I think the Union is a little different from the ordinary factor in that it makes a sort of contractual relation between it and the producer under which it assures him of a certain price under Savannah market, it is all brought there if it is on the railroad, it is so much under the Savannah market, so much off Savannah, different fluctuations with fluctuating market. I do not know the details of the differentials; at Mobile it may not be as much as two and one-half cents a gallon, but it would be something off. The New Orleans Naval

255 Stores Company has disappeared, liquidated; you can say it was taken over by the Union Naval Stores Company which I think owned it. The Imperial Naval Stores Company, is producing concern down there and is still operating. I have no interest in producers except through the factorage companies, who advance money to the producer, and I think take his receipts under a guaranteed contract that he will send it all to them if he furnished the money, and who sometimes takes a mortgage on his plant; I

don't know very much of the detail; and I may say that in going into these properties I am answering more than I know in this way; these are details, and I have nothing whatever to do with them. Of course I could not have been thirty years in the business without knowing them on general principles. The Union Naval Stores Company sells all of its receipts to the American, but the J. P. Williams Company does not. We do not quite contract for all their receipts outside of Savannah, to buy them. I believe the J. R. Saunders Co., has gone out of existence; if my information is correct the Williams Naval Stores Co. of Pensacola took over or bought it. The J. R. Saunders Co., was engaged in the factorage business; we have got a new Saunders Co., the successor to the J. R. Saunders Co. The new Saunders Co. has succeeded the J. R. Saunders Co., and was in competition with us; Mr. J. R. Saunders died last winter, I think and the business was liquidated. I am not sure why the American Naval Stores Company of New York was organized and I want to find out the reason if I can; I didn't have anything to do with it. I have been told here in this room that I am the chairman of the board of directors, or they think I am. I never was at a directors' meeting, they have meetings I believe, and I get notice; I think I am a director, but I never have had anything, didn't have anything to do with its organization. I don't know that I am the chairman of the board. I don't know why the National Transportation & Terminal Co., was organized, and a charter taken out in New York for that; I didn't have anything to do with it at all. Of course if you want the reason why we had it there is another question, but why it was organized separately I can't tell you; I didn't have anything to do with those separate organizations. Prior to this indictment I had a sheet handed me about once a week or so showing what the stocks of the American were, showing the stocks on hand of each particular grade at each particular place.

Q. Show where they were purchased, show where the new stocks received from the precious time, wouldn't it, between the two statements—you say you had them about once a week—it would
256 show the purchase of stock and the sales for the last week, wouldn't it show the different grades?

A. Yes. It would bring down the stock on hand. If a certain given quantity of any one grade had been raised it would not have shown on that stock report; the increased amount of profit that was received would not have shown on the report, which did not show profit, but only showed stock on hand. Taking your supposed case that our weekly report showed a thousand barrels of I and a thousand barrels of K, and the next report would show 2,000 barrels of K and no I, and no sales of I, in that time. I could answer by saying that owing to the fact that — our various yards they frequently regrade rosin in order to establish uniformity of grade, any changes of that description such as you have illustrated would have been the result of such regrading, and would not have indicated at all that there was any marking up of grades. The regrading would have appeared on the report, down and up, up and down if it were figured out by any one, but as we always expected to see

some go up and some come down no one would have paid any attention to that. I would have seen that there were changed in the stock if I had figured it out, but I would not have figured it out, because I would have expected it without figuring.

Q. If your coastwise turpentine which you purchased in the Southern ports and shipped North to the American yards at Brooklyn had decreased in volume, that would have appeared on the reports, wouldn't it?

A. I never followed the reports on gallonage. I don't think we received reports on the amount. We would receive it in barrels. You see if we had a report of that kind, and I think very likely the report comes in something about the barrels, but we never carry in New York a very large stock of turpentine, and it is fluctuating all the time, and before they could get a report here the changes in it would be so that it would not be valuable to us, so that is the reason I have never followed it. If by tank turpentine you mean that held by the Naval Stores Export Co., some by the Consolidated, and some by the producers, I said I bought part of it, some six thousand barrels from W. C. Powell in my office at 43 cents; I didn't get it. Mr. Powell represented himself as the president of the Consolidated Naval Stores Company; I did not buy it, the American Naval Stores Co., bought it. It was not owned by Mr. Powell or his company at the time, so Mr. Powell told me after I bought it,

257 it would be necessary to get Mr. Toomer's consent to deliver it, and it was not delivered. I have met and known Thomas

Sealy of New York; I met Mr. Larenden about 20 years ago, and I know Mr. Turton. I think Mr. Turton has Mr. Chapeau, a broker here, as a buyer on the Savannah market, but I do not know Mr. Chapeau's business. Mr. Seely does not buy all of his stuff from us; I don't think he buys the most of it, I don't know; and the same applies to Turton. The word "otter" in my business does not mean anything to me; I never saw double otter, two otters, one right after the other; to my mind the word "otter" in any cipher does not tell me, or in connection with any bill of stuff that we order out, mean raise the grade one grade. I never saw the word double otter, and as you are speaking of the code books, I would not know the American code book, if you handed it to me—I am talking about the code books of the American Naval Stores Co.—if you had one in your hand and handed it to me, I never saw one in my knowledge.

When I am in Savannah I watch the Board of Trade market pretty closely; I do not keep in touch with it daily by telegraph or cable; when I am away but once in a while, yes; I don't mean to say that I am neglecting all business; if I am on business I keep posted. I am to a certain extent familiar with the volume of business in a general way of the American Naval Stores Company but not as familiar as Mr. Nash.

With reference to the effect upon the market of Savannah of the American Naval Stores Co., remaining out of the market in Savannah, and at the same time buying heavily at the closed ports, I think that the absence from a market for a great length of time would not favorably affect the market, it might have a tendency to

lower it, although I have seen just the reverse particularly in the three months which you brought to my attention. We were out of it at that time, and it rose, that is one of the things that puzzles me. That was the manipulative movement of the Patterson Export Co., principally, which lasted I think about 15 days, until Mr. Coachman was elected in the Consolidated.

Q. When you stay out of the market and don't buy and the market is depressed, and when you go into the market and do buy and the market goes up, you don't call that a manipulative movement at all?

A. If we would go into the market, put it up, we would feel badly about it because then we would have to pay the advanced price, and if it went down, and we did not go in, we might feel badly about it because we had been taking it all the time at these closed ports under contract, and taking stuff that we did not want at a higher price than we thought it was worth.

258 I did not watch the Standard Oil buying here particularly.

I do not know that it did not buy a barrel in the Savannah market from May, 1907, until March, 1908, and was amazed when you asked that question. I don't think that is correct, but it may be so. Mr. Nash pays more attention to market matters than I do; as I said before my connection with the American Naval Stores Co., is that of financing it, and its general construction. I do not keep so very much in touch with the business, stocks on hand; I look into the statistics from time to time of the supply and stocks in our hands. When we know pretty well what the general supply is, we can take that and get at what our competitors have; we get at our stocks, and then we know that the rest of it must be in the possession of factors or producers; we keep a good keen watch I think on business in general. There have been cases where the Fernandina steamers that I talked about come to Savannah and complete their loading before they make their European trip, but I don't know that they came in the months of February, March and April, 1908. The American Naval Stores Co., owns two steamers, the "Iris" and "Clematis." I do not deny that it is true that when they came and loaded partially at Fernandina in those months they were brought into Savannah, because I do not know.

Rosin quotations on the Savannah Board of Trade are made twice a day, at 11 o'clock and 4 o'clock. I think the hour for bids is after 4 o'clock, but that is not a quotation; those sales are posted at 11 o'clock the next day. The rosin bought after 4 o'clock is reported as a rule at 11 o'clock, and it fixes the quotation at 11; then there is another quotation posted or the same one perhaps if there is no transaction between 11 and 4 that changes the quotation.

Q. For the last three or four years in Savannah, isn't it true that there is not what you call active trade on the Board in rosin, but the factors merely state what they have on hand, and the buyers give them sealed bids after the 4 o'clock closing of the Board of Trade?

A. So far as I have traded in rosin on the Board, the trade never

has been such, not in the last four or five years, but in any year that I have been living in Savannah. Turpentine might be sold up and down any hour of the day, but it would not be quoted officially in the Board of Trade except at 11 and 4, the two official changes. I think the sales of rosin do not occur until after 4 o'clock, then as you say they put the various buyers, about a dozen here, they all put in their sealed bids, those that want to buy their rosin, and the one that pays the most gets the rosin. If
259 there was to be some factor did not sell that night, that afternoon after 4 o'clock, and made up his mind to sell between 11 and 4 the next day, and reported it to the Board of Trade, there would be a change at 4 o'clock.

Q. Then there would not be any change in the quotation of rosin during the day in Philadelphia, would there, based upon Savannah price?

A. I just told you there might be changes between 11 and 4. They would be quoted at 4; if there was a sale between 11 and 4 it would be quoted at 4 and a change of the quotation; I am quite sure of that. The signature to the letter shown me dated Savannah, Ga., May 28th, 1907, signed American Naval Stores Co., by E. S. Nash is that of Mr. Nash. I do not know who signed the letter dated Savannah, Ga., May 29th, 1907, signed National Transportation & Terminal Co., J. F. Myers, President. I would not allow the signature of Thomas C. Myers to letter dated June 3rd, 1907, signed National Transportation & Terminal Company, by Thomas C. Myers, Assistant General Manager.

The way we regard it, they are primary markets for naval stores from New Orleans to Wilmington; the others, most of the others do the business on a Savannah—Savannah is a basic market for value, yes, that is about what you mean. Savannah has a decided effect on those markets in this country in these primary markets that we call them, but as to its effect all the world over, I should not say that it had—that that is a question. It is true that Savannah has very very superior shipping facilities.

Q. And why is it that you do not have any yards of your own in Savannah, and have them in Jacksonville, Fernandina, Tampa and Pensacola?

A. When I came here we found certain conditions, that is, we found that the railroads were storing the rosin and had it in hand, and I often would have liked to have our own yards here, but the railroads liked the revenue, and we could not get the switching facilities and the arrangement I would have liked to have, and so had to abandon that hope and thought.

With reference to the necessity for us to have the revenue from these storage yards at other ports in order to carry on our business, and the necessity for us to have them in Savannah, the difference in Jacksonville and Savannah is that we transport—I am sorry I did not make myself clear enough to you, I will be glad to do so: It is a long haul from Jacksonville to Fernandina, it is not like rolling it across the wharf as it is here from the yard to the river;

260 we have to transport from Jacksonville to Fernandina, which you suggest is 30 miles, it is a good long haul, not like 300 yards here between the rosin and the waterfront, and that has to be transported that 30 miles, we pay the railroad for doing that, it is a considerable expense, and that is the reason, to meet that extra expense that we have to do business in Jacksonville on anything like a Savannah parity, we have to have that initial storage as part compensation; the rest of the compensation, or at least another part, comes from the fact that the rosin in Jacksonville is on our own yards, and we do not have to pay any one else except ourselves this renewal storage from month to month. At Pensacola the yard is some distance in the interior, and I never heard anybody object to our putting our rosin on our yards there, they are very well kept, nobody ever objected to it. The Transportation Company has its yards at Pensacola, Tampa, Fernandina and Jacksonville, but none at Savannah because we cannot get them. We have our yards at those places; as you say, their prices on naval stores work up and down with the Savannah market.

I was indicted December 11, 1899, for an infraction of the interstate commerce law, an offense that I did not commit myself. I shouldered the responsibility for other people, as being the head of my company; I took the responsibility for something that had occurred, and pleaded guilty and paid the fine. It was an infraction of the interstate commerce law. On February 11, 1907, I, in connection with others, was indicted for a violation of the Sherman Anti-trust Law, pleaded guilty, and paid our fines.

Redirect examination:

The infraction of the interstate commerce law involved an arrangement between a railroad here and our company whereby we should have the privilege of underbilling to a certain extent. Our office had made the arrangement with a railroad official here; the railroad official would have gotten into trouble if we had defended our position, and we felt that, after all, probably we had made an innocent mistake; it was quite a common thing in those days in merchants to do the same thing; almost all large commercial houses had the same privilege, and it was, in fact, at the time it was arranged, nothing was thought about it; we happened to be unfortunate enough to have this matter drawn out, and I considered that the best way out would be to admit the fact that we were at fault, pay the fine, and assume the blame myself. It was the nature of a special privilege granted to a large shipper; we gave this railroad a large amount of business, and they gave us a consid-
261 eration for the volume of the business.

With reference to the former prosecution for the alleged violation of the Sherman Act, I was in New England in the summer of 1906 with my family, and I noticed in the newspapers that the Government was beginning to take some action against corporations for violations of the Sherman Anti-Trust Law, which, as far as my observation had gone, as far as I knew, had been practically a dead letter on the books since it passed Congress. It occurred to me that

in some of our business affairs we might be encroaching or approaching a violation of that law. I had a business arrangement, that is, our company, the S. P. Shotter Co., had the business arrangement with the Patterson Downing Co. Mr. Nash, who was the president of that company, was in Europe about that time. About two or three weeks afterwards he returned; I took the first occasion of coming down to New York, and brought this matter to his attention. We then consulted the counsel of the Patterson Downing Co. in New York, and he thought we were all right; but I wrote a letter to Capt. Mackall, my counsel, and brought it to his attention, and he seemed to think that we were all right; but I saw him shortly after that in New York, I think, and told him that I did not feel perfectly satisfied, and we took other advice from other counsel, some further New York advice. The result of it was that we decided that we had better be on the safe side, so we then took counsel of the firm of Hornblower & Byrne, Mr. Hornblower, who was appointed by Mr. Cleveland to the Supreme Court bench. The result of it was that we liquidated the Shotter Co. and the Patterson Downing Co., and the stocks of rosin and turpentine; a company, called the American Naval Stores Company, was formed, and the various stocks of rosin and turpentine and properties of that description were sold to this company. We took advice even, Mr. Byrne and others, Mr. Bryne, of Hornblower & Byrne, went to Washington to consult the Attorney General. All of the contracts that we had which in the slightest degree could be construed—we leaned backwards in this respect—were cancelled, and we have had nothing of that sort since. We have been exceedingly particular. But it was not until after the American Naval Stores Co. had been formed, the Shotter Co. and the Patterson Downing Co. had gone out of existence as trading companies, and had been out of existence from the first of December; the American Company started in business the first of December, and it was in February the following year that the Shotter

262 Co. and the Patterson Downing Co. were indicted. At the time that the American Naval Stores Company went into business, we had not the faintest idea of such a thing as an indictment, or that there ever would be. I and the others mentioned in this former indictment were indicted, and pleaded guilty to that indictment under your advice, or perhaps it was Capt. Mackall's. Since this former case, where I pleaded guilty to the indictment on the 11th day of February, 1907, I have never wilfully violated any statute of the United States. The Union Naval Stores Company, in which I am a stockholder, is interested as a factorage concern in a general sense, and then it had a certain number of farms it advances money to; it holds interest in their business. I do not know that any turpentine farms actually belong to the Union. It advances largely to turpentine farmers. It is a partner in turpentine farms, in addition to advancing. I have never attended any meetings of the directory of the New York American or the New York National Transportation & Terminal Company.

Q. Has any statement been furnished your office, of any sort, shape or kind, or have you ever seen one that would indicate or sug-

gest what rosin, that rosin had been sold, regraded without reinspection?

A. I could not have told it from any report; I could have told if any regrading, but not any marking up; that is what you mean? If the report showed anything, it would show that there was inspection before regrading, I should say; I have never seen anything to indicate the contrary; I have never seen a report that indicated marking up. I would not have known it. I have never seen anything to indicate that spirits of turpentine had been tampered with and too much turpentine taken out of a barrel.

Counsel for defendants offered and read in evidence contract between Naval Stores Export Company and J. P. Williams Company.

Counsel then announced that defendants rested.

263 S. A. ALFORD, sworn for the Government in rebuttal.

Direct examination:

I live in Chipley, Fla., about 115 miles from Pensacola. From April, 1907, to April, 1908, I was in the producing branch of the naval stores business, and have five plants now. In 1907 the stuff from my five places was marketed as to grades and gauges and so on on the inspection by the State inspector; he is the public inspector in Pensacola. Settlement was made with me on that basis, and that is the last I know of it.

W. J. OLIVER, sworn for the Government in rebuttal.

Direct examination:

I live at Pooler, Ga. In 1907 I was producing naval stores at Bloomingdale, and shipped it to Savannah for sale.

Q. As to grading of rosin or gauging spirits, upon what basis or classification was your product marketed and you settled with, what sort of inspection?

A. I sold Chesnutt & O'Neill, of Savannah, and Mr. Register, if I am not mistaken, was their guager and sworn inspector, J. E. Register. J. E. Register graded my rosin, and I was settled with on that basis.

F. J. ARTHUR, sworn for the Government, in rebuttal.

Direct examination:

I live at Buffalo, N. Y., and am in the soap making business with the Larkin Company, at that place, being their buyer of rosin, fat and oils. From April 1st, 1907, to April 1st, 1908, our requirements were approximately 20,000 to 35,000 barrels, the majority of which, I think, we bought from C. B. Turton. I know of the American Naval Stores Company; we bought from them, I believe, through the New York offices. We have always understood in the purchases made from the American that the grading was done in the South. We do not buy turpentine in large quantities, that is, until recently;

I have had occasion to investigate how that is gauged since I have been in the city.

264 Cross-examination:

I cannot say that we did buy rosin in 1907 directly from the American Naval Stores Company. We were not aware of the fact that the rosins were inspected by the American Naval Stores Company before sale; I do not know positively whether they were or not. We understood in buying from the American that we would get the grade we bought, and felt that the company was reliable for the grades being delivered which we purchased.

CHAS. A. HARRIS, sworn for the Government in rebuttal:

Direct examination:

From April, 1907, to April, 1908, I lived in Buffalo, and was in the soap manufacturing business, wherein we used rosin. We bought a carload of rosin in October, 1907, from the American Naval Stores Company, through the New York office. We thought we were getting the Southern grades; if there was any regrading or any tampering with these grades, in any way, the American gave us no information of it.

Cross-examination:

I understood that the cities of Savannah and Jacksonville, or the State, employed inspectors who were impartial; and my understanding was that when we bought we bought according to the inspection in those two cities. If we had bought as we thought M rosin, and when it came to our factory it turned out to be window glass, I would think I made a good bargain. If I found that the Savannah inspector had graded the rosin too low, I would look to the man I bought it from. I always supposed that the American Naval Stores Company were simply dealers in the rosin that was inspected at Savannah or Jacksonville. Naturally we would look to the party from whom we bought to make good any difference in grade. The bill of lading has been dated from Jacksonville, and I suppose the rosin came from there, by boat to New York, and New York to Buffalo, either canal or freight; none from Savannah for several years. I think that in 1907 came from Jacksonville; I have no means of knowing that fact, yet I am quite sure it came from Jacksonville. I have always specified Southern grades, usually ordering it verbally in my office from their agent. I have seen bills of lading from Jacksonville.

265 Redirect examination:

I do not of my own knowledge know about that particular car.

W. F. COACHMAN, recalled for the Government.

Direct examination:

I remember the making of the contract in 1905 between Patterson Downing Co. and the S. P. Shotter Company of the one part and the Consolidated of the other; it was negotiated first in New York, but I do not recall whether it was closed in New York or in Savannah; I was present at a part of the negotiations. I misunderstood your question; I thought you had reference to a contract previous to 1905, and not that one which is the one that is in force now. The present contract was made in Savannah, where I was at the time making the transfer of the Naval Stores Export Company to the American, when this contract was entered into at the same time. There were three objectionable clauses in the contract which we stated to them. At that time I was vice-president and member of the executive committee of the Consolidated, and W. C. Powell was president. One was that we should not engage in the selling of naval stores; one that prohibited the Consolidated from doing business west of the Alabama river; and one requiring the storage of receipts sold in their yards, the yards of the American or the National Transportation & Terminal Company. That I raised any objections at that time to any paragraph other than that with reference to the storage, I do not know. The other had been threshed out in the previous contract, and we were required to comply with it. With reference to the storage provision, the basis of our position stated to them at the time was this: The Consolidated was a large stockholder in the Naval Stores Export Company, which company had just sold its yards in Jacksonville to the Atlantic Coast Line. I took the position that it would be bad faith on the part of the Consolidated, having made this sale to the Coast Line to immediately divert all of its receipts to another yard. I thought it was even worse than that, because they had bought it as I understood it for the purpose of using it as a naval stores yard. I know nothing about any manipulation of the Savannah market early in 1908. From 1905, after the Export Company became inactive, I was not engaged in any business for 266 the following two years, and did not expect to be engaged in any again. I was elected president of the Consolidated, I think it was January 14, 1908.

Q. Mr. Boardman has been understood by counsel for the Government to have made in substance this statement: Coachman said, much to my surprise and in a way that indicated he would not like it to get to the outside public, that when the Toomer stuff was sold that he thought it would be better for all concerned if the price obtained left no equity for the Export Company, what have you to say to that?

A. It is absolutely untrue; I did not make the statement. I never made the statement that if they had any money left they might be able to do some damage to the industry, while if they are wiped out in this turpentine transaction they would not need to be reckoned with in the future. Mr. Boardman made those statements in my presence; I won't be sure that Mr. Barnett was present at the time

or not. When I was on the stand before I did not recollect whether when subpoenaed here before the Grand Jury I called on Mr. Carson, but I frequently called when I was in Savannah. I recollect now the conversation with Mr. Carson with reference to some paving materials and automobiles. I have seen in the paper something regarding Mr. Carson's testimony. We went at some length into road paving materials and electric automobiles, but I cannot recall any mention of the gentlemen who are defendants.

Cross-examination:

I conferred with Mr. Boardman with regard to forming a commission house. I know from Mr. Barnett that the plan had been suggested by him about forming this combination and had been previously discussed before I saw Mr. Boardman in New York. The conversation with Mr. Boardman did not take quite a range, it was not a very long conference; it included this matter of this commission. The purpose of my visit to New York was if possible to do something in the interest of the naval stores industry and as a general proposition that was the line of conversation with Mr. Boardman. In that conversation dealing with the commission business I was aware of the fact that there were a number of thousands of barrels of turpentine being held in Jacksonville out of the market. In this conversation with Mr. Boardman we discussed the turpentine, as I previously testified. I do not recall that I expressed any

disappointment about the Barnett plan in any respect unless
267 it was that Mr. Boardman said he was opposed to it. I think it very likely that I did say at that time that I was satisfied that this turpentine that was there held ought to be sold or marketed. I did not mean it to be thrown upon the market and sacrificed.

Q. You did not want that fact to be made public?

A. Oh, yes; I had often stated it. That is the same turpentine that the Consolidated now owns; I think the Consolidated took it over about five or six months ago. In this conversation I positively did not say that I thought it would be better if the price obtained just closed up the entire transaction and left no equity in the Naval Stores Export Company or in Mr. Toomer, and I want to state why: The purpose of my visit to Mr. Boardman, as I said before, was to see if something could be done in the interest of the naval stores industry. I was not there to gain something for my company, and therefore I could not possibly have expressed such a desire because the turpentine operators who I was trying to serve were not owners of this commodity.

Q. You were there on the idea of carrying out this commission scheme. You wanted to get all the commission houses into this plan. Here was Mr. Toomer, with ten or eleven thousand barrels of turpentine. Now, under those circumstances, didn't you at that time say to Mr. Boardman in New York, and in the presence of Mr. Barnett, in substance, as follows: That you thought it would be better for all concerned if this turpentine was sold and marketed?

A. I think I did. I positively did not then at that time say that I thought when it was sold and marketed it would be better if there

is nothing left anybody in that turpentine transaction, just wiped out, no equity left.

Redirect examination:

There was very little discussion with reference to the commission project, because by the time it was mentioned—there was no argument with reference to it, because as soon as it was broached, Mr. Boardman stated he was opposed to it. He said that it would not furnish sufficient revenue for his company, that is the substance, that it was necessary for them to speculate on the market on account of the expense of their large organization. Mr. Boardman asked me what in my opinion was the cost of producing turpentine, and I told him that at that time, with the prevailing prices of rosin, about fifty cents. He asked me what I thought the operator should get for it—turpentine, you will remember, had been about 268 70 cents—I said I believed that the turpentine operator should get at least sixty cents per gallon, and my experience with the trade has been that they are willing to pay that. That they are willing to pay even more than that for it if it can be on a stable basis, but the trade does not object to the violent fluctuations of this market, because in the manufacture of their article they want something upon which to base the cost, and I said 60 cents is not too much for the turpentine operator. He says, you mean 20 per cent. on his investment? I said yes. He said, "It is too much, and I will never agree to it." I did not read this testimony until I returned home, and in the Evening Metropolis I am quoted—this is the question, this is not the statement: "You are aware that one of those letters got into the hands of Senator Taliaferro and was used by him in Congress?" To which I replied: "I am." I wish to qualify that statement. I am aware that the letter was used in Congress, because I have seen *in* it in the Record. I am not aware—I did not attend any of the committee meetings there; I do not know who submitted the letter, nor that Senator Taliaferro had any connection with it whatever. I wish to make that explanation.

CHARLES E. SMITH, recalled for the Government.

Direct examination:

I was in the employ of Geo. L. Hammond; I did some work for the American Naval Stores Company. I looked over those inspection reports, and what purport to be duplicates of them, yesterday; they are mine. I could not say now what part of the various parcels or cargoes of naval stores that passed through that yard were inspected by me; there were lots shown to me; I had orders to sample different lots. I did not inspect all of the stuff that passed through the yards. I could not say what portion of the stuff that passed through that yard these reports cover.

DAVID HILL, sworn for the Government in rebuttal.

Direct examination:

For one year from May 1st, 1907, I worked with the American Naval Stores Company, working around the yard; I was sent on outside work. Mr. Walter O'Keefe was my foreman. My
269 work was mostly outside work, getting barrels from the steamers and the lighters. I would take a few men with me and sometimes we would get sent out the marks, sometimes we would get sent out to make the grades of rosin a grade higher. That occurred very often; I don't remember on how many occasions. Mr. Smith, the inspector, never saw one of the barrels on the outside; I have never seen the man there.

Cross-examination:

I went out on that strike. Mr. Hoyt simply told me that I was wanted to be called at any time; he saw me at my house in Brooklyn, and told me that he would have to subpoena me, and that I would have to come to Savannah in this case of regrading. I asked him if he could let me know when I was to come, and he said he would let me know ahead of time. I cannot say how he knew where I was; he said the Government would pay me \$1.50 per day and five cents mileage. I made that understanding myself; I asked him about that. Since I have been here I have not talked to him at all about this case, nor Mr. Martin, nor any one at all. I was supposed to report to Mr. Hoyt when I arrived; I have seen him most every day. I have only talked to my friends that I am with, those that came from Brooklyn with me, Mr. Clehan, Mr. Degroot, Mr. McGowan and Mr. O'Keefe. We did not talk about this case; I do not remember what I said; we have said a few things to one another. I was working on the yard, and knew nothing about the inspection of rosin myself; I knew what was inspected and what was not inspected. During the time I was on the yard I estimate there were something like 150,000 barrels of rosin on the yard, of varying grades, some twelve or fourteen grades. I could not say how many barrels of rosin were inspected on that yard during that time; I don't know. When they were inspected, I know that more or less inspection of the low grades of rosin was done upon a percentage; that is to say, we would go through a lot of one hundred E's, and if there were ten or fifteen per cent. running all right, that ended the inspection. They shipped it from north without inspection. I do not know whether it had been inspected in the south before it went north. I do not know that certain grades were lowered; never never to my knowledge was there a grade lowered to make up a lot; to my knowledge was there a grade lowered to make up a lot; out my knowing it. I knew that Mr. Smith was the inspector that did the work of inspecting on the yards. How much he inspected
and how much he did not inspect I did not know at all times,
270 because I was outside at times. Mr. Hoyt told us that if we needed any money he would see that we could get it while

we were here. I know that a great deal of rosin passed through those yards in New York going to interior points.

Redirect examination:

When we got here we had no money at all, and we asked Mr. Hoyt if we could get any money, if we could draw some money when we wanted it, and he said yes. I drew some from the District Attorney or the United States Marshal. I have never spoken to either the District Attorney or you (Mr. Toomer) before this minute, this morning; never exchanged a word with either of you.

WALTER O'KEEFE, recalled for the Government.

Direct examination:

By the COURT:

Q. I will ask you, Mr. O'Keefe, this question: Do you know that more than three lighter loads of rosin were landed there or three parcels of this rosin that were raised, the marks on the barrels that were raised from the mark that had been put on by the inspectors, the grade of it, more than three lighters?

A. Do I know there were more than three lots?

By the COURT:

Q. Yes?

A. I do. I do know there were more than that.

By the COURT:

Q. Did they arrive on barges from the South?

A. Some come on steamers directly to the docks.

By the COURT:

Q. Do you know this man Hill?

A. Yes, sir.

By the COURT:

Q. Did he work on the yard?

A. Yes, sir; I employed him.

271 E. C. PATTERSON, recalled for the Government.

Direct examination:

The Patterson Export Company had an office in Savannah during the first three months of 1908. During that period we bought approximately 2100 barrels of turpentine upon this market, being 1300 barrels in January, about 300 in February and about 500 in March, that is according to my memorandum. That was the extent of our turpentine operations here at that time.

Cross-examination:

I would not care to undertake to say how many barrels of turpentine we purchased on the Savannah market for the year. We

bought approximately 930 barrels between the first and fifteenth of January; there was no market on the fifteenth; and between the first and the fifteenth spirits jumped up from 40¼ cents to 54 cents a gallon.

GEO. F. WHITE (U. S. Marshal) sworn for the Government.

Direct examination:

I was in Court when the witness, Hill, made some reference to having asked Mr. Hoyt and obtained from you some money. Mr. Hill and three or four other- of the Brooklyn witnesses were paid by me their mileage to Savannah and \$1.50 per day; I do not think Mr. O'Keefe drew any money.

Cross-examination:

The mileage is five cents a mile from New York to Savannah, and the same going back, and I think the distance is about 880 miles; the excursion rate by steamship is about \$32.00. I sent a check for part of it to the United States Marshal in New York, about \$30.00, I think.

Redirect examination:

I sent a check to the United States Marshal at Brooklyn, N. Y., for the railroad fares of each of them down here, or steamer
272 fare, for their expenses from New York to Savannah, advanced by the Marshal; I do not think it included Mr. O'Keefe, but did include that coterie of gentlemen who came down with him.

By the COURT:

Q. Isn't that very frequently done? That is nothing unusual?

A. It is nothing unusual. In fact you might say that it is an invariable rule where we have witnesses from a distance. I have paid a lot this week going north from here.

The oral evidence for the Government concluded with the testimony of Thomas Purse when recalled for the Government, and the testimony for the defendants began with that of J. A. G. Carson and concluded with that of S. P. Shotter. In rebuttal, the Government introduced the evidence of S. A. Alford, W. J. Oliver and others, concluding with the testimony of George F. White.

When the witness C. W. Dill was recalled by the Defendants the testimony as to the slips and reports mentioned, these were turned over to the attorneys for the Government for examination but they were not introduced in evidence.

The following is a complete and full statement of the documentary evidence introduced, the oral and documentary evidence being stated in accordance with the consent order taken on the 14th day of May, 1909.

The Government introduced an exemplification, in legal form,

showing the incorporation of the American Naval Stores Company on the 2nd day of November, 1906, in the State of West Virginia. The charter states the principal place of business shall be located at Number 25 Bull street in the City of Savannah, Chatham County, Georgia, gives it full and complete powers touching trade and commerce in naval stores of every kind. The names of the incorporators are: Albert R. Elmendorf, Spencer S. Thomas, Morris F. Knudson, George Bringolf and Robert Campbell. The original capital stock of the Company was \$1,500,000.00 divided into 15,000 shares of the par value of \$100.00 each, but the record showed the subsequent increase of the capital stock to \$2,200,000.00.

The Government also introduced the incorporation of the
273 "National Transportation & Terminal Company of New Jersey," incorporated in the State of New Jersey on the 4th day of December, 1902, to do a warehouse and terminal business.

The Government also introduced the following testimony: The contract between the West, Flynn & Harris Company and the American Naval Stores Company of West Virginia, bearing date the 1st day of June, 1907, and to the following effect:

"This Contract made this 1st day of June, A. D. 1907, between the West, Flynn & Harris Company, at this time resident in Jacksonville, Fla., and the American Naval Stores Company of West Virginia also at this time resident in Jacksonville, Fla.

Witnesseth: The West, Flynn & Harris Company agrees that from and after this date to June 1st, 1909, to place all the rosin and turpentine which it may receive at Jacksonville and or Fernandina, Fla., on the yards of the National Transportation and Terminal Company, and to pay said initial storage thereon at the rate of four (4) cents per barrel on turpentine and three (3) cents per barrel on rosin, and the usual and customary charges for handling, tankage, etc.

The National Transportation and Terminal Company is to perform the usual and customary services for said initial storage fee, and to extend to purchasers of said rosin and spirits, with- exception, its best services, and for customary charges.

The American Naval Stores Company in consideration thereof, agrees to bid at its discretion, for the receipts of the West, Flynn & Harris Company, and if said bid is accepted to purchase said receipts of West, Flynn & Harris Company. This bid is to be accepted if it is equal to that of any other purchaser, provided West, Flynn & Harris Company decides to sell that day; the preference being given at even prices to the American Naval Stores Company.

In the event the West, Flynn & Harris Company refuses to sell part of all of its receipts, any day or days, then it is optional with the American Naval Stores Company whether it subsequently purchases same.

Also the American Naval Stores Company reserves the right to reject any lots held out for speculative purposes.

Additional storage will be charged for goods held over thirty days.

The West, Flynn & Harris Company when requested is to send to Fernandina such naval stores as it may in any way receive or

control which originates on the Seaboard Air Line Ry., and
274 is to be handled by it in Jacksonville and or Fernandina.
This is optional with the American Naval Stores Company.

The West, Flynn & Harris Company shall not be required to actually transfer to the premises of the National Transportation & Terminal Company its water receipts but instead thereof is to pay the American Naval Stores Company a lump sum of \$400.00 for the business of the first year, and likewise a lump sum of some amount to be agreed upon at the beginning of the second year, and the same to be as nearly as possible in proportion to the original payment.

Signed in duplicate the day and year first above written.

AMERICAN NAVAL STORES COMPANY,

By E. S. NASH,

WEST, FLYNN & HARRIS COMPANY,

By J. W. WEST, *Press.*

Also the contract dated the 7th day of December, 1905, between the Paterson-Downing Company, a corporation of West Virginia, the S. P. Shotter Company, a corporation of West Virginia, as parties of the first part, and the Consolidated Naval Stores Company, the West, Flynn & Harris Company, the Barnes & Jesup Company and Alford Brothers Company, as parties of the second part, to the same effect as the contract with the West, Flynn & Harris Company of June 1st, 1907, hereinbefore just set out.

In connection with this contract the Government put in a letter addressed to the Consolidated Naval Stores Company signed by the S. P. Shotter Company, per the Defendant, J. E. Cooper Myers, as Vice-President, dated December 6th, 1906, and reading in substance as follows: "We beg to advise that the Company has gone into liquidation, having sold its business in its entirety to the American Naval Stores Company. We have transferred our contract with your good selves to the American Naval Stores Company who will continue to act on the same lines as before."

Also, correspondence showing that, before the assumption of this contract by the American Naval Stores Company, at the instance of the American, the tenth and eleventh paragraphs were stricken. The tenth paragraph reads as follows: "The Consolidated and Associates expressly agree that after the execution of this contract and as long as the same is in operation neither they nor either of them, their associates or successors will handle or deal in spirits of turpentine or rosin, or solicit or accept consignments thereof produced or originating West of the Alabama River." The

275 eleventh paragraph reads as follows: "The Consolidated and Associates, their associates and successors, agree that during the term of this agreement they will not engage in buying or selling or in the exportation of naval stores either directly or indirectly except as aforesaid."

The Government introduced a letter from the American Naval Stores Company, by E. S. Nash, President, from Savannah, Georgia, dated May 28th, 1907, to the Consolidated Naval Stores Company to the following effect: "Referring to conversation of this date be-

tween your Mr. H. L. Covington and the writer, relative to the interpretation of Clause No. 6 of the contract between our Companies dated December 6th, 1905, we beg to advise that Mr. Covington agrees with us that the clause is subject to but one construction, i. e., that all rosin and turpentine received by the Consolidated Naval Stores Company at Jacksonville, Fernandina and Pensacola is to be placed upon the premises of the National Transportation & Terminal Co., subject to storage charges as agreed. In order, however, to relieve the Consolidated from some possible embarrassment, we have agreed, and do now agree not to insist that certain receipts including those by water, and from and controlled by Pritchett shall be transferred to N. T. & T. Co., premises, but we have claimed, and do claim, and it is on your part agreed, that on all such receipts you pay us the initial storage, the same as if the goods were placed upon our premises.

"We are pleased to have reached this solution of a temporary Impasse, and awaiting your confirmation thereof, we remain."

In response, the Consolidated, through W. C. Powell, President, wrote its letter of May 29th, 1907, to E. S. Nash, President of the American Naval Stores Company as follows: "Replying to yours of yesterday, we beg to say we will pay you the initial storage of 3 cents per barrel on rosin, and 4 cents per barrel on turpentine on all naval stores from our customers received by us at Jacksonville, Fernandina and Pensacola and placed on storage on other yards than those controlled by the National Transportation & Terminal Co., you according to us the same fair treatment as up to within the past ten to twenty days. Trusting our relations in the future may be pleasant and satisfactory in every way, we remain."

The Government also introduced an advertisement published in the Savannah Naval Stores Review in its issue of August 24, 1907, of the "National Transportation & Terminal Company." 276 alleged to be incorporated under the laws of New Jersey, with statements in the advertisement to the effect that the capital paid in is \$250,000.00; the President is J. F. C. Myers; Secretary and Treasurer, C. J. De Loach; the principal office in Jacksonville, Florida; that it transacts a general business as bonded warehousemen, and has storage yards and tankage at Fernandina, Florida, Jacksonville, Florida, Pensacola, Florida, and Mobile, Alabama; that special attention was given to the transportation of spirits of turpentine in tank cars from producers' shipping stations to the ports, saving producers' freight on empty barrels, leakage, as well as turning and other expenses.

Also, the same issue containing an advertisement of the American Naval Stores Company, of West Virginia, successors to S. P. Shotter Company, Paterson-Downing Company, Exporters and dealers in all grades of rosin, pure spirits, turpentine, tar, pitch, rosin oil, and other products of the pine tree. Head Office: Savannah, Georgia. Branches: New York, Philadelphia, Chicago, St. Louis, Cincinnati, Louisville, Wilmington, Brunswick, Jacksonville, Tampa, Pensacola, Fernandina, New Orleans, Mobile, Gulfport. Officers: E. S. Nash, President, S. P. Shotter, Chairman Board of

Directors; J. F. C. Myers, Vice-President; G. M. Boardman, Treasurer; C. J. De Loach, Secretary.

Also an issue of the same Review of February 22nd, 1908, with the same advertisements.

The Government introduced the correspondence and bill of the Lilly Varnish Company with the American Naval Stores Company covering the following: A letter of May 16th, 1907, from the Lilly Varnish Co., to the American Naval Stores Co., of Cincinnati, Ohio, stating that the writer had wired: "Please ship us tank car Turpentine on today's market" and now confirm the same, and requesting a prompt shipment; a letter of June 5th, 1907, complaining of delay; a letter of June 8th, 1907, cancelling the order for tank car, and bill of June 8th, 1907, made out by the American Naval Stores Company of Cincinnati, against the Lilly Varnish Company for one tank car of turpentine, and finally a memorandum of June 21st, 1907, directed to the Lilly Varnish Company and making allowance for delay in transit of a car \$99.91.

The Government introduced a letter of April 9th, 1907, from New York to Fels & Company, of Philadelphia, signed American Naval Stores Company, by C. W. Dill, Manager, stating among other things, as follows: "We have some stock in Tampa and may be able to offer you some more from there, provided we could make necessary freight arrangements.

277 "After Mr. Fels left our office today it occurred to me that both his interests and ours could be better served by some mutual arrangement whereby we could supply you with rosin sufficient to keep your factory going at a fixed basis over Savannah and at an average price of all sales in Savannah for a period of a week or whatever time we decided upon. This will give you the benefit of always being able to buy your rosin at a reasonable figure and would also benefit us in the buying markets. I think our interests would be much better served in this respect. The more I consider this matter the more important it seems to me for us to get together on some mutual ground."

Another letter between the same parties, dated May 31st, 1907, stating, among other things, as follows: "As stated to you we had to take hold of the market in order to get goods sufficient to fill our orders and the only way we could get them was to bid more than other parties and on the 25th, 27th, 8th, and 9th we bid a trifle more than others but as stated above this was purely out of necessity."

"I feel confident that if I could put matters before you exactly as I see them you would be so thoroughly impressed with the situation that you would take up either one or the other of the two propositions on which I have been talking. Of the two I believe a contract for 75% of your requirements would be the best for you in the long run but failing this I thoroughly believe that a purchase of a round lot of rosin would prove decidedly to your interest and a such a purchaser would be to our interest as well as I am inclined to believe that if I could place before Mr. Shotter an offer from you of 15,000 to 16,000 barrels of K, M, N, WW at \$5.95, 6.10, 6.2 and 6.40 freight prepaid to Pascual Station, shipment about 1,00

barrels per week, I could get him to consider it favorably. If we did not enter into such a transaction I would like to have you give me your word that you would not oppose us while we were trying to secure these goods for you something on the lines that we talked about in the car Wednesday."

Another letter, between the same parties, dated August 8th, 1907, to the following effect: "In view of the efforts which you have made to do business with us, I have taken up the matter again with Mr. Nash, and we have gone over it very thoroughly. We find that we could spare from our stock in Savannah a small quantity of Pale Rosins and Mr. Nash has authorized me to place the following offer before you: 500 K, 5.90; 1000 N, 6.40; 400 WG, 6.60; 100 WW, 6.70.

This is every barrel of rosin that we could spare you from
278 Atlantic Ports, and the offer is made in an effort to reciprocate in your recent efforts to do the lot from Tampa. Freight complications from Tampa are such that it makes that transaction very hard. The writer is exceedingly anxious to place ourselves right before you, so that you will understand it is our intention to meet you as far as possible in the matter of doing business together. If the above proposition meets with your favorable consideration, kindly telegraph us tomorrow morning."

Another letter, between the same parties, dated April 29th, 1907, stating, among other things, "As explained to you when the market gets down to a point where we feel that it is a purchase we will be buyers ourselves and not sellers and if you put others in the market at the same time it will mean simply an advance in the market which neither benefits you nor us."

"I would be willing to talk with you either on a contract basis or on a round lot of 10,000 or 12,000 barrels, but I believe you would be able to buy on contract cheaper goods than I would be willing to put you in a round lot for and you can see that it would be folly for us to sell you a round lot of rosin at a discount on the market and then run the chances of getting the market down.

"If you care to take up with me either one of these propositions I will be glad to come over tomorrow on the 11 a. m. train and spend an hour with you on the subject. If you wish this kindly telegraph me early tomorrow morning so that I can get the 11 a. m. train."

The Government put in evidence the contract between the American Naval Stores Co., (of West Virginia) and the Detroit Soap Co., of Detroit, Michigan, dated January 28th, 1907, covering a purchase of an estimated quantity of 6,000 barrels, annual; duration of contract from July 1st, 1907, to January 1st, 1909, as called for by Detroit Soap Company, the destination of shipment to be Detroit, Mich., freight to be prepaid by the American Naval Stores Company; to be sixty-five (65) cents per 280 pounds in car lots over the Savannah, Ga., official closing market on the day the order is received by American Naval Stores Co. Detroit Soap Company to have privilege of buying not over 900 barrels during any period of thirty years.

The Government also put in evidence the following letter referred

to by the witness George M. Boardman in his testimony, it being a letter from the said witness to J. F. C. Myers, Savannah, Ga., dated February 7th, 1908:

279 "At Mr. Shotter's suggestion, I wrote to Mr. Downing to see if he would be willing to give A. N. S. Co., some Downing Co., notes, if doing this would help us to finance so that we could make advances to him when needed. I think we are in a measure bound to do this considering the fact that when Downing has large credit balances, he leaves the money with us. Downing is quite willing to give this paper and it occurred to me that perhaps it could be used to the extent of \$100,000, with the Merchants Leede Bank, which I judge by recent letter from Mr. De Loach are willing to advance us \$100,000, in addition to present line if they can have additional security. As I am not in position to guarantee the bank for the A. N. S. Co., I think perhaps they would be glad to have the Downing paper endorsed by us, which would really be stronger and better than my guarantee. Mr. Downing has sent me \$60,000, of the Downing Co., paper in case I could place some of it up here but it must be done very carefully so as not to impair our credit but it is uncertain just what success I will have using this in view of the restrictions which must govern the placing of it.

"I was fortunate to secure \$25,000 from the New York Life Insurance & Trust Co., for four months at 6% and I have very good assurance that we will be able to get some more money from this Bank in the near future. If you find that the Downing paper can be used to advantage with the Bank in the West, will you kindly take the matter up with Mr. Downing and he will be quite willing to do his part.

"I had a visit from Barnett and Coachman this week and discussed the general situation at some length. I think Coachman is anxious to make some sort of arrangement with us and feels a good deal disappointed that the Barnett scheme in some form was not workable. I also think that he is well satisfied that the accumulated Turpentine ought to be sold and marketed and the time is not very far off when he will be called upon to take up this matter. Coachman said much to my surprise and in a way that indicated he would not like it to get to the outside public, that when the Toomer stuff was sold, that he thought it would be better for all concerned if the price obtained left no equity for the Export Company. He gave me the impression from his remarks that if they had any money left, they might be able to do some damage to the industry, while if they are wiped out on this turpentine transaction, they will not need to be reckoned with in the future. Please keep this information strictly private. It is so hard to draw Coachman's hand, that when any of us succeed in doing it even a little bit, it would be unfortunate to have any of the information get back to him and perhaps spoil future chances of success in any negotiation that may come up.

280 "I dwelt at considerable length upon the fact that all of the fighting that had occurred in the last few years had cost everybody money but the producer and that he had or ought to have reaped large

benefits from the fictitious prices that prevailed as the result of the fights. Coachman agreed with me as to this.

"I also emphasized the fact that it was my belief that if the Producer and the Factor and the Distributor did not each stick to his own business and stop meddling with matters that were outside of his own business, there was bound to be trouble all the time and consequent loss of profits.

"Coachman thought that the only benefit that obtained from the large quantity of holding Spirits, was the influence it would have on the Producer regarding the present year's box cut. He seemed to think that no other argument or statement of facts would have been as strong and convincing that there was a surplus supply to be carried over into the new crop.

"I told Coachman that he probably wondered how we stood on the turpentine market, and that while I was not at liberty to give him any detailed information, that I did know as a positive fact that we were not much concerned as to whether the old spirits were marketed in this crop or the next crop; that I was pretty sure it could not be marketed in this crop no matter how low a price was put on it and that as far as we were concerned, we were attending to our business, were comfortably situated and when we got ready to market the stuff, if they would say so, we would be prepared to negotiate for a trade. He seemed to think that the conditions might require some action before Messrs. Shotter & Nash return and I told him if such a condition arose, it would be well for him to see you in Savannah and that I was quite sure you would be ready to communicate with the gentleman in Europe and might be able to bring about some results quickly if he thought it was advantageous to do this.

"I also said that as far as any arrangement with the Consolidated was concerned beyond the existing arrangement, that I failed to see why we all could not go on doing business as we have for the last year or two without any further agreements, but that if they had any proposals to make we would be glad to hear what they were but that we had nothing to suggest. With kind regards, Yours sincerely.

281 The Government introduced in evidence the following letter:

E. S. Nash, President; J. F. C. Myers, Vice-President; S. P. Shotter, Chairman Board of Directors; Geo. M. Boardman, Treasurer; C. J. De Loach, Secretary.

American Naval Stores Company of New York, 21-24 State Street.

NEW YORK, May 31st, 1907.

Messrs. Fels & Company, Philadelphia, Pa.

GENTLEMEN: Referring to your statement that we had been advancing the market ever since Mr. Collingwood was in Savannah and my statement to the contrary, I have gone over our reports since

my return and find that on the 18th (19th holiday) 20th, 21st, 22nd, 23rd, and 24th other parties bid more for pale rosins than we did. I told you there were four days in succession but I find that there were six days regularly that competitors overbid us so that reports they have been sending you must have been fixed up to suit their own convenience.

If you will stop at our office on your next visit I will show you reports of the full transactions for the six days referred to above.

As stated to you we had to take hold of the market in order to get goods sufficient to fill our orders and the only way we could get them was to bid more than other parties and on the 25th, 27th, 8th and 9th, we bid a trifle more than others but as stated above this was purely out of necessity.

I feel confident that if I could put matters before you exactly as I see them you would be so thoroughly impressed with the situation that you would take up either one or the other of the two propositions on which I have been talking.

Of the two I believe a contract for 75% of your requirement would be the best for you in the long run but failing this I thoroughly believe that a purchase of a round lot of rosin would prove decidedly to your interest and as such a purchase would to our interest as well as I am inclined to believe that if I could place before Mr. Shotter an offer from you of 15000 to 16000 barrels of K, M, N, WW, at \$5.95, 6.10, 6.20 and 6.40, freight prepaid to Pascual Station, shipment about 1000 barrels per week I could get him to consider it favorably.

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If we did enter into such a transaction I would like to have you give me your word that you would not oppose us while we were trying to secure these goods for you something on the lines that we talked about in the car Wednesday.

If you care to take such a proposition kindly telephone me in the morning and I will do my best to work it through.

Yours truly,

AMERICAN NAVAL STORES CO.,
By C. W. DILL, *Manager*.

The Government introduced and read to the jury the following Rules of the Savannah Board of Trade:

Rule 8, as to Spirits of Turpentine, reading as follows: "Inspector's returns shall correctly set fourth the contents, both as to quantity and quality, and when accepted shall be final between buyer and seller, except in case of fraud."

Also the following rules of this Board of Trade as to rosin: Rule 1. "Rosin shall be bought and sold by the barrel of 280 pounds gross, and shall be weighed on five (5) pound notches of scale beam (the pounds between 5-pound notches to be thrown off), and proper allowance to be made for green timber, moisture and adhering dirt, and every barrel shall have the weight and grade distinctly marked on it."

Rule 2. "All samples shall be at least seven-eighths of an inch square, and taken from at least six inches from the surface of the

rosin, and the grading made to conform to the standard approved by the Savannah Board of Trade."

Rule 3. "All rosin shall be weighed before sampling and cooperating."

In connection with the testimony of the witness J. F. Glatigny the following is a statement agreed upon as to the result of the reports referred to by the witness.

"Reports of American Naval Stores Co., to J. F. Glatigny, Supervising Inspector, show purchases by the American Naval Stores Company at Savannah as follows:

1908.	Rosin, barrels.	Spirits, barrels.
January	7573	962
February	11809	896
March	9444	208

283 The Defendants introduced in evidence the Charter incorporating the American Naval Stores Company of New York on the 19th day of November 1908, with the same general powers as the American Naval Stores Company indicted in the case. The amount of capital stock was stated to be \$50,000.00, divided into shares of \$100.00 each. The names of the Directors are: Albert R. Elmendorf, Spencer S. Thomas, Morris F. Knudson, and George Bringolf. The incorporation was in the State of New York and the principal office was located in the Borough of Manhattan; in the City, County and State of New York.

Defendants also introduced the Charter of the National Transportation & Terminal Company, incorporated in New York, March 22nd. 1907, with the same powers as the National Transportation & Terminal Company of New Jersey.

Defendants introduced the contract dated July 15th, 1905, between the Naval Stores Export Company, a corporation duly organized under the laws of the State of Delaware, having its executive officers in Jacksonville, Fla., as party of the first part, and the J. P. Williams Company, of Savannah, Ga., as party of the second part. This contract was signed by the Naval Stores Export Company, per W. F. Coachman, President and attested by its Secretary, and by the J. P. Williams Company, through J. A. G. Carson, First Vice-President and attested by its Secretary. Under its terms, the Naval Stores Export Company agreed to buy all of the receipts of rosin and spirits — turpentine which the J. P. Williams Company may receive from its customers, except its receipts at Savannah, Ga., upon the terms and conditions mentioned in the contract, and contains the following stipulation: "It is further understood and agreed that the said party of the second part (the J. P. Williams Company) shall deliver its receipts of naval stores at the several ports hereinbefore mentioned to such naval stores yards or terminals as may be indicated or designated by the said party of the first part. (The Naval Stores Export Company), and that the said party of the second part shall pay unto the said party of the first part for all naval stores delivered to the yards designated by the said party of the first part, the initial

storage of 3 cents per barrel for rosin and 4 cents per barrel on spirits of turpentine and in addition thereto shall pay to the party of the first part its charges on any goods held out of the market." And also the following stipulation: "The said party of the second part agrees to sell to the said party of the first part all of the
284 rosin and spirits of turpentine it may receive from its customers, except its receipts at Savannah, Ga., on the above terms and conditions, from the 15th day of July, A. D. 1905, up to and including the 31st day of March, A. D. 1906, and the said party of the first part hereby agrees to buy, receive and pay cash for said receipts upon the above terms and conditions."

Be it further remembered that the foregoing constitute a full and complete statement of the oral and documentary evidence as prepared under the consent order taken in Open Court on the 14th day of May, 1909.

Be it further remembered that, in his charge to the jury, the Court instructed them as follows: "There is no charge made in the indictment and no evidence to justify the conclusion that the American Naval Stores Company, or the other corporation Defendant, the National Transportation and Terminal Company, was an unlawful or a wrongful organization. It is entirely immaterial that it may have been made up of the stockholders of two or three former corporations, you are justified in finding that either of the New York corporations is an unlawful Company or a fraudulent Company."

And that the Court further instructed the jury as follows: "Before you can convict any individual Defendant of the offense charged, you must be satisfied that that individual personally participated in the offense. It is well settled that a principal is not thus liable for the act of his agent or representative even if done in the general course of employment, unless they are directly authorized or consented to by him; for the authority to do a criminal act will not be presumed."

Be it further remembered that the Court sentenced the Defendant, E. S. Nash, to pay a fine of \$3,000.00; the Defendant S. P. Shotter, to pay a fine of \$5,000.00 and to be imprisoned in the jail of Chatham County, Georgia, for three months; the Defendant, J. F. C. Myers, to pay a fine of \$2500.00 and to be imprisoned in the jail of Chatham County for three months; the Defendant, Carl Moller, to pay a fine of \$5000.00, and the Defendant George M. Boardman, to pay a fine of \$2,000.00 and also assessed against them their pro rata of the costs, not including, however, in the costs, the witnesses who were summoned but not sworn.

285 And now, in furtherance of justice and that right may be done, the Defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, now the Plaintiffs in Error, present the foregoing as their Bill of Exceptions in this case and as to each and all of the rulings hereinbefore complained of that is to say, the overruling of the demurrer as to the first and second counts of the indictment; the refusal of the Court to direct a verdict; the refusal of the Court to charge as hereinbefore stated and the Court's charging as hereinbefore stated; the rul-

ings of the Court touching the admission of evidence, as hereinbefore stated; and the overruling of the motion in arrest of judgment, and all of the rulings covered by their Assignment of Errors, save only that appertaining to the Plea in Abatement filed by the National Transportation & Terminal Company. And they pray that this Bill of Exceptions may be settled and allowed and signed and sealed by the Court and made a part of the record, as provided for by law and in accordance with the consent order taken in Open Court on the 14th day of May, 1909. And the same is accordingly so done, and the said Bill of Exceptions is accordingly settled and allowed and signed and sealed by the Court and made a part of the record.

This the First day of June 1909.

[L. S.]

WM. B. SHEPPARD,
Judge Southern District of Ga., Pre-
siding in said Circuit Court.

W. W. MACKALL,
ADAMS & ADAMS,
GARRARD & MELDRIM, -
Attorneys for Defendants, Now Plaintiffs in
Error, Edmund S. Nash, Spencer P. Shot-
ter, J. F. Cooper Myers, George M. Board-
man, and Carl Moller.

Service acknowledged this June 1st, 1909.

ALEXANDER AKERMAN,
Assistant U. S. Attorney.

Filed June 5th, 1909.

T. F. JOHNSON, *Clerk.*

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Certificate of Clerk.

In the Circuit Court of the United States for the Eastern Division of
the Southern District of Georgia.

THE UNITED STATES OF AMERICA
versus

THE AMERICAN NAVAL STORES COMPANY et al.

Appealed upon Writ of Error to the United States Circuit Court of
Appeals for the Fifth Circuit.

I hereby certify that the foregoing 390 pages comprise a full, true, complete and correct copy of the records, Bill of Exceptions, Assignment of Errors and all proceedings in the case of The United States of America, versus American Naval Stores Company, et al., in which the Plaintiffs in Error are Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, Carl Moller and George Meade Boardman, and the defendants in error is the United States of America.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court at Savannah, Georgia, this 7th day of June, A. D. 1909.

[SEAL.]

T. F. JOHNSON, *Clerk.*

287 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing printed record of 286 pages, in the case of Edmund S. Nash et al., Plaintiffs in Error, against The United States, Defendant in Error, numbered 1951, was printed under my supervision, and is identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of December A. D. 1910.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,

Clerk of the United States Circuit Court of Appeals.

288 Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, began on the first Monday in October, A. D. 1909, at Atlanta, Georgia, and on the third Monday in November, A. D. 1910, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

Be it remembered that heretofore to-wit: on the 14th day of June A. D. 1909, a transcript of record pursuant to a writ of error to the Circuit Court of the United States for the Southern District of Georgia, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Edmund S. Nash, et al., are Plaintiffs in Error, and The United States is Defendant in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 1951. That thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

289 And thereafter on October 6th, 1909, a stipulation to correct record was filed in said cause in said Circuit Court of Appeals in words and figures following to-wit:

Stipulation to Correct Record.

In the United States Circuit Court of Appeals for the Fifth Circuit.

EDMUND S. NASH et al., Plaintiffs in Error,

vs.

THE UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Georgia, E. D.

In the above-stated cause it is agreed that the year "1908", in the third line of page 283 of the printed record, is not the correct

date, and ought to be "1906", that is to say, that the American Naval Stores Company, of New York, was incorporated on the 19th day of November 1906 and not 1908. And the Clerk of the above Circuit Court of Appeals is hereby authorized and directed to change the date to 1906.

This October 6, 1909.

ALEXANDER AKERMAN,
Attorney for Def't in Error.
SAM'L B. ADAMS,
PETER W. MELDRIM,
Att'ys for Pl'ffs in Er.

The foregoing has the following indorsements to-wit: Nash, et al. vs. United States, No. 1951. Correction of date, "1908", to 1906 on p. 283 of printed record. U. S. Circuit Court of Appeals. Filed Oct. 6, 1909. Charles H. Lednum, Clerk.

290 And thereafter the following proceedings were had in said cause in said Circuit Court of Appeals, viz:

Argument and Submission.

No. 1951.

EDMUND S. NASH et al.

vs.

THE UNITED STATES.

OCT. 8, 1909.

On this day this cause was regularly called, and after argument by Samuel B. Adams, Esq., for plaintiffs in error, was continued until to-morrow.

No. 1951.

EDMUND S. NASH et al.

vs.

THE UNITED STATES.

OCT. 9, 1909.

On this day this cause was called for further hearing, and after argument by W. M. Toomer, Esq., and Alexander Akerman, Esq., for defendant in error, and P. W. Meldrim, Esq., for plaintiffs in error, was continued till Monday.

No. 1951.

EDMUND S. NASH et al.

vs.

THE UNITED STATES.

OCT. 11, 1909.

On this day this cause was called for further hearing, and after argument by P. W. Meldrim, Esq., for plaintiffs in error was submitted to the court.

291 And thereafter on November 29, 1910, an opinion of said Circuit Court of Appeals was filed in said cause in words and figures following to-wit:

Opinion.

Filed 29 Day of Nov., 1910. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 1951.

EDMUND S. NASH et al., Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Georgia.

Samuel B. Adams and Peter W. Meldrim, for plaintiffs in error.
Alexander Akerman, Ass't U. S. Att'y, and W. M. Toomer, Special Ass't U. S. Att'y, for defendant in error.

Before Pardee and Shelby, Circuit Judges, and Foster, District Judge.

By the COURT:

A majority of the court is of opinion that there is no error in the record. The judgment of the Circuit Court is, therefore,
Affirmed.

291½ And on the twenty-ninth day of November, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause in the words and figures following, to-wit:

Judgment.

No. 1951.

EDMUND S. NASH et al.
vs.
THE UNITED STATES.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Georgia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

Nov. 29, 1910.

292 And thereafter on December 15, 1910, a petition for re-hearing was filed in said cause in said Circuit Court of Appeals in words and figures following to-wit:

Petition for Rehearing.

293 In the United States Circuit Court of Appeals, Fifth Circuit,
October Term, 1910.

No. 1951.

EDMUND S. NASH et al., Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Southern
District of Georgia, Eastern Division.

Petition for a Rehearing.

Samuel B. Adams, Peter W. Meldrim, Attorneys for Plaintiffs
in Error and Petitioners.

U. S. Circuit Court of Appeals. Filed Dec. 15, 1910. Charles H.
Lednum, clerk.

294 In the United States Circuit Court of Appeals, Fifth Circuit,
October Term, 1910.

No. 1951.

EDMUND S. NASH et al., Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Southern
District of Georgia, Eastern Division.

And now come, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, and Carl Moller, by their Attorneys at Law, and respectfully pray that an order may be made for a re-hearing of the argument in the above-stated cause, on a day to be appointed by this Court, and base their prayer upon the following grounds, to-wit:

1. The great magnitude of the cause not only to the Plaintiffs in Error, particularly the two under jail sentences, but to the business world and the public, it being such a cause as is worthy not only of very full argument, but of the views of the Court for the guidance of the business world and the Profession. No case involving the penal provisions of this Act has ever been before the Supreme Court,

295 or before any Appellate Court of the United States, save only this case and that of the United States vs. Union Pacific Coal Co., et al., reported in 173 Federal 737.

2. A division between the Judges of the Court as to the affirmance of the judgment of the Court below, this fact suggesting some doubt and uncertainty, which further argument may remove.

3. Upon a re-hearing, the Court may, in the light of further argument, determine that it is proper to certify the legal questions to the Supreme Court of the United States, and that Court will then have the power, in its discretion, to ask that the entire record be sent to the Court, and, in this way, a decision from the Supreme Court on the assignments of error can be secured.

4. A general affirmance, without any other opinion or elucidation will justify the conclusion that the Court found that these Plaintiffs in Error were guilty of the character of conspiracy alleged in the indictment, some of the specifications of which involved moral fraud and wrongdoing. The record would not show that the Government abandoned the three gravest charges. A discussion of the assignments of error may relieve the Plaintiffs in Error of this odium, which must attach to the verdict as it stands in view of the indictment and the inferences that would be drawn from the jail sentences.

5. The Supreme Court of the United States has before it, for re-argument and determination, cases of large importance involving this law, and its adjudications will probably throw light upon some of the legal questions involved in the assignments of error, although the cases are civil cases and this case is one involving the penal provisions of the law.

We note that the President in his recent message, referring to this law, says "They" (meaning the business men of the country) "are now seeking to know the exact limitations upon business
296 methods imposed by the law, and these will doubtless be made clearer by the decisions of the Supreme Court in cases pending before it."

It is respectfully submitted that the Plaintiffs in Error, for their future guidance, and business men generally are entitled to greater light and guidance than the present general affirmance affords.

6. The printed brief of the other side was not received in time to give it proper consideration before the former argument in this Court. If we are permitted to make further argument, we earnestly believe that we can show that the theory of the Government does not involve any violation of the Sherman Act, and that there is no real evidence against the Plaintiffs in Error. We are sure that we can present our contentions more clearly and satisfactorily than we were able to do at the former argument.

7. Owing to the voluminous record, the many and novel points involved, and the undeveloped status of the principles of law applicable to this case, Counsel for the Plaintiffs in Error feel assured that, in the presentation of the issue to the Appellate Court they must have failed to stress with sufficient emphasis and clearness certain important, and as it seems to them, controlling features in the case, and they confidently believe that if granted a re-hearing they

will be enabled by additional argument to convince the Court not only that the verdict and judgment in the Court below are illegal and work a grave injustice to the parties convicted, but, if allowed to stand, will tend to encourage unscrupulous and indiscriminate attacks on any large corporate interest in the country which may be so unfortunate as to have business enemies or unsuccessful competitors, or which deals in articles of interstate commerce subject to the law of supply and demand—a law which is beyond the control of legislative acts or business methods.

Should the Court overrule this petition, we ask that, if there be a division of opinion between the two Circuit Judges, as to the affirmance of the judgment of the Court below, this fact be made to appear in the Record, and we submit that we are entitled to this fact. Should this petition be overruled, we will apply to the Supreme Court of the United States for a writ of certiorari. In the case of Forsyth vs. Hammond, 166 U. S. 512, the Court, in noticing the reasons why the Act establishing the Courts of Appeal empowered the Supreme Court to issue a writ of certiorari, says, among other things, "As the Courts of Appeal would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two Judges of equal rank were on each side of the questions involved." We ask that the Court will let the fact appear, a fact which seems to be material to the application for the writ, that there is a division between the two Circuit Judges, if there be such division, and that the Court will give us the benefit of its views on the controlling questions involved, should the Court deny this application for a re-hearing.

We also ask, in the event the Court is of the opinion that this is a proper case for a writ of certiorari, and is further of the opinion that there is no objection to its so saying, that it will, in some way, indicate this fact, in the event this petition is overruled.

SAMUEL B. ADAMS,
PETER W. MELDRIM,

Attorneys for Plaintiffs in Error and Petitioners.

298 We, Samuel B. Adams and Peter W. Meldrim, Attorneys at Law for the Petitioners, certify that we thoroughly believe that the foregoing petition contains good grounds for re-hearing, and that the reasons therefor are well-founded, and we further certify that the said petition is made in good faith and not for the purpose of delay.

This December 12th, 1910.

SAMUEL B. ADAMS,
PETER W. MELDRIM,

Attorneys for Plaintiffs in Error and Petitioners.

299 And on the twentieth day of December, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order denying rehearing in said cause in the words and figures following to-wit:

Order Denying Rehearing.

No. 1951.

EDMUND S. NASH et al.

vs.

THE UNITED STATES.

DEC. 20, 1910.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

300 I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the 13 pages next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the Court (except the transcript of the record from the Circuit Court of the United States for the Southern District of Georgia) in a certain cause in said court, numbered 1951, wherein Edmund S. Nash, et al. are Plaintiffs in Error, and The United States, is Defendant in Error as full, true and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of December A. D. 1910.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,

Clerk of the United States Circuit Court of Appeals.

301 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, and Carl Moller are plaintiffs in error, and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-

302 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said

Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

303 [Endorsed:] File No. 22,463. Supreme Court of the United States, October Term, 1910. No. 842. Edmund S. Nash et al. vs. The United States. Writ of Certiorari. U. S. Circuit Court of Appeals. Filed Mar. 11, 1911. Charles H. Lednum, clerk.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

In obedience to the command of the within writ, and by direction of the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, I, Charles H. Lednum, Clerk of said Court, as a return to, and in compliance with, said writ, do hereby transmit to the Honorable The Supreme Court of the United States, a true, full and correct copy of a certain stipulation filed by the parties in relation to the return upon the writ of certiorari issued by the Supreme Court of the United States in the case of Edmund S. Nash, et al., vs. The United States, as fully and completely as the same now remains of record in my office.

Given under my hand and the Seal of said United States Circuit Court of Appeals for the Fifth Circuit at the City of New Orleans, Louisiana, this 11th day of March, 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
*Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit,*
Per WILLIE A. PORTER, *Deputy.*

304 In the United States Circuit Court of Appeals for the Fifth Circuit.

EDMUND S. NASH et al., Plaintiffs in Error,
vs.

THE UNITED STATES, Defendant in Error.

From the Circuit Court of the United States for the Southern District of Georgia, Eastern Division.

In the above-stated cause, wherein the petition for the writ of certiorari presented by the Plaintiffs in Error, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, has been granted by the Supreme Court of the United States, and the writ of certiorari has, accordingly, issued to

the Honorable the Judges of the said United States Circuit Court of Appeals for the Fifth Circuit.

It is hereby agreed and stipulated that the certified Transcript of Record on file with the Clerk of the said Supreme Court of the United States, filed with the petition for certiorari, can be taken as a return to the writ.

This March 8th, 1911.

JOHN C. SPOONER,
SAM'L B. ADAMS,
Att'ys for Plaintiffs in Error.
F. W. LEHMANN,
Solicitor General.
ALEXANDER AKERMAN,
Assistant U. S. Attorney.

The foregoing has the following indorsements to wit:

No. 1951. In the Circuit Court of Appeals for the 5th Circuit. Edmund S. Nash, et al., vs. The United States. Stipulation as to Record. U. S. Circuit Court of Appeals. Filed March 11, 1911. Charles H. Lednum, Clerk.

305 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the above and foregoing is a full, true, perfect and complete copy of a certain stipulation filed by the parties in relation to the return upon the writ of certiorari issued by the Supreme Court of the United States in the case of Samuel S. Nash, et al., versus The United States, No. —, as fully as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 11th day of March A. D. 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
*Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit.*

306 [Endorsed:] File No. 22,463. Supreme Court U. S., October Term, 1910. Term No. 842. Edmund S. Nash et al., petitioners, vs. The United States. Writ of certiorari and return. Filed March 14, 1901.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

EDMUND S. NASH, et al,
Plaintiffs in Error,
vs
THE UNITED STATES,
Defendant in Error.

Certiorari to the United States
Circuit Court of Appeals for
the Fifth Circuit.

No. 197.

BRIEF OF SAMUEL B. ADAMS FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This case was originally tried in the Circuit Court of the United States for the Southern District of Georgia, Eastern Division. It comes to this Court by certiorari from the Circuit Court of Appeals for the Fifth Circuit.

These Plaintiffs in Error (Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, and Carl Moller) were convicted on the first two of the three counts of the indictment, on the 10th day of May, 1909. The case was taken to the Circuit Court of Appeals on writ

of error, and was argued before that Court in October, 1909; the Court being composed of the Honorables Don A. Pardee and David A. Shelby, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

On the 29th day of November, 1910, nearly fourteen months after the argument, the Court of Appeals handed down a decision, of which the following is a complete copy: "A majority of the Court is of the opinion that there is no error in the record. The judgment of the Circuit Court is therefore affirmed." (Page 232, of the Record. **Our references will all be to the top pages of the "Transcript of Record" in this Court).**

On the 15th Day of December, 1910, these Plaintiffs in Error filed, in the Court of Appeals, the petition for a rehearing, set forth on pages 233, et seq., and this petition was denied on the 20th day of the same month, without further opinion. The latter part of this petition submitted the following request: "We ask that the Court will let the fact appear, a fact which seems to be material to the application for the writ, that there is a division between the two Circuit Court Judges, if there be such a division, and that the Court will give us the benefit of its views on the controlling questions involved, should the Court deny this application for a rehearing." The petition endeavored to set forth the magnitude and importance of the issues involved as the reason of this request. The Court of Appeals did not see fit to comply with the request and, as noticed, overruled the petition for rehearing without further view or expression from the Court.

A petition for the writ of certiorari was then presented to this Court, and was granted.

The Indictment in this case contains three counts. The third was stricken on demurrer, and we will, therefore, deal only with the first two.

The purpose of the first count is to charge these five Plaintiffs in Error, one other individual and two corporations with the offense of a Conspiracy to Restrain Trade, contrary to the first section of the Act of July 2nd, 1890, commonly known as the Sherman Anti-Trust Act. The purpose of the second count is to charge the same Defendants with a Conspiracy to Monopolize Trade, contrary to the second section of this Act.

Neither count charges any Defendant with the doing of any act of any kind. If these counts are sustainable, then the Defendants could be guilty if they merely formed a conspiracy to restrain, or monopolize, trade, although they had immediately abandoned the purpose without doing anything in its furtherance. According to both counts, the alleged conspiracy contemplated the twelve means set out in identically the same language in both counts. Each states that the conspiracy "**was to be effected** amongst other ways as follows," and then twelve different ways or means by which the alleged conspiracy was to be accomplished are set out. The idea of both counts seems to be that the eight Defendants got together and agreed that they would restrain and monopolize the trade in naval stores, and made a part of this agreement the use of the twelve means set forth. It is not alleged, we repeat, that, in point of fact, any one of these means was ever used, or that anything unlawful, or harmful, or reprehensible, was done, unless the mere formation of the purpose set forth in the indictment involves in and of itself an infraction of the law.

The two counts are in all respects identical save only that one undertakes to charge a conspiracy to restrain trade and the other a conspiracy to monopolize trade. The same evidence was introduced and relied on to sustain both counts. The pleader simply saw fit to divide up the case into two counts.

There were eight Defendants in the Court below, two corporations and six individuals. The corporations were the American Naval Stores Company, alleged to be "a corporation duly organized and existing under and by virtue of the laws of West Virginia," and the National Transportation & Terminal Company, alleged to be a New Jersey corporation. The six individuals were the five Plaintiffs in Error (Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller) and C. J. DeLoach. The attorneys for the prosecution, at the conclusion of the Government's evidence, announced an abandonment of the case as to DeLoach, and the Judge below accordingly instructed the jury to find DeLoach not guilty.

The only trader mentioned in the indictment is the American Naval Stores Company. The other corporate Defendant was not alleged to be in trade of any kind. The indictment averred as to it that "it owned and controlled warehouses and terminal facilities" for handling naval stores. It is not even alleged that the naval stores handled by it were the subjects of interstate commerce, or had any connection with such commerce. No effort was made to show that this company was in any sense a trader, or had any connection with trade.

The individual Defendants were not alleged to be traders, or in trade in any way. All of them were alleged to be representatives of the American Naval Stores Company, and three of these same representatives were also alleged to be representatives of the other corporate Defendant. The allegation in both counts is that Nash was the President and chief executive officer of the American Naval Stores Company; Shotter was the Chairman of its Board of Directors and one of its principal executive officers; Myers was the Vice-President and one of the chief executive officers; Boardman was the Treasurer and one of the chief executive officers; DeLoach was the Secretary and one of its principal officers; and Moller was the Manager of the Jacksonville,

Florida, branch, and an agent and employee of the company. It is also alleged that Myers was the President and chief executive officer of the other corporate Defendant; DeLoach was its Secretary and one of the principal executive officers; and Moller was the manager of the Jacksonville, Florida, branch of this Defendant, and its agent and employee.

It is not alleged in the indictment that any of the individual Defendants contemplated, or intended to secure, or monopolize, any trade for themselves, or in their own interest, or the doing of anything for their individual benefit, or on their individual account. What they contemplated doing was for and in behalf of the corporation (the American Naval Stores Company) represented by them.

The principal Defendant was the American Naval Stores Company. The case turned around this company. If there was any monopolizing, this company was the "monopolizer." If there was any restraint of trade within the meaning of the law, it was for and in behalf of this company. As appears by the Record, the Court charged the jury fully as to both corporations, particularly as to the American Naval Stores Company, and the case as to these corporations was as fully and as completely submitted to the jury as was the case as to the other Defendants. As appears by reference to page 66 of the Record, "the jury empanelled in the said cause, after they had been in their jury room considering their verdict for two and a half hours, returned into Court with their verdict finding the Defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, guilty on the first and second counts of the indictment, finding the Defendant, C. J. DeLoach, not guilty, and making no return as to the two corporate Defendants and no allusion to these corporate Defendants. The jury was not interrogated as to these corporate Defendants, or either of them, and the verdict was received and the jury discharged. The instructions of the Court to the jury covered these two corporate Defendants as completely as they did the individual Defendants."

The Defendants filed the demurrer set forth on pages 13 et seq. of the Record. This demurrer was overruled as to the first and second counts, and exceptions have been duly taken. (Page 16.)

At the conclusion of the Government's case, a motion was made to direct a verdict upon the grounds stated in the Record, which was overruled, and exceptions taken. At the conclusion of the entire testimony for both sides, the same motion was again made on the same grounds and overruled, and exceptions taken.

There are a few exceptions to the admission of evidence.

A number of requests to charge were submitted and exceptions have been duly taken to the refusal of the Court below to give these requests. Objections were also made to the charge as given, and exceptions have been duly taken.

A motion in arrest of judgment was also made before sentence was pronounced, based upon the contention that the verdict rendered was incomplete and illegal, and exceptions have been duly taken to the overruling of this motion.

Against the objections of Defendants in the Court below, the Government was permitted to introduce evidence designed to show the doing of the things covered by what the Government will call the specifications stated in the two counts. As to three of the most serious (the circulation and publication of false statements, the issuance and causing to be circulated and hypothecated fraudulent warehouse receipts, and the attempt to bribe employees of competitors) the Record is entirely silent, save only the indictment. There is not a syllable of evidence to justify these specifications, and Judge Sheppard withdrew them from the consideration of the jury. We shall contend that there was no real evidence as to other specifications which were submitted.

The theory of the prosecution, as it will be gathered from the Record, was that the American Naval Stores Company did a very large business in naval stores, and, in order to secure such a business, resorted to reprehensible practices.

Hence the charges of falsely regrading rosin without previous re-inspection and falsely gauging spirits of turpentine, which may be called the seventh specification.

The National Transportation & Terminal Company was probably brought into the case because the American owned all of its stock, and the theory of the Government was, that what it called false gauging, was done upon the yards of this company in Jacksonville, and for the benefit of the American.

The Defendants in the Court below objected to this line of testimony as illegal and not warranted by the indictment or the law, and also insisted that the charges embodied in such specifications were untrue.

Under the charge to the jury, it cannot be said that the jury found to be true any specification which, if true, would involve reprehensible conduct, because, if they found the conspiracy as explained in the charge, it would be sufficient, in order to convict, to find that the conspiracy contemplated the doing of any one of the things referred to in the specifications; for example, the diversion of naval stores to Savannah (the bill of particulars required by the Court specifies Savannah), which would ordinarily have gone to Florida ports, and by sometimes going into the market, when it suited the American, and sometimes staying out.

After the demurrer was overruled, Defendants made the motion for a bill of particulars, to be found on page 21 of the Record, and the Court passed an order thereon, and, in compliance with this order, the bill of particulars mentioned on pages 27 et seq. was furnished. Further objection was made, and the result was the supplemental order which appears on page 30. The indictment, therefore, has to be read in connection with the bill of particulars.

We shall hereafter notice particular features of the case and of the evidence when we submit our points and brief.

SPECIFICATION OF THE ERRORS.

The Defendants in the Court below filed to the indictment the demurrer set forth on pages 13 et. seq. of the Record. A number of those appertain to the third count, and will, therefore, not be considered. Those relied on in this Court are thus stated and numbered in the original demurrer as follows: "1. The Act of Congress, upon which the said indictment purports to be based, is too vague, uncertain and indefinite to be the basis of a criminal prosecution, and the provisions thereof, looking to a criminal prosecution, are, for this reason, inoperative and void. 2. Because the said Act is bad as a penal statute in that it undertakes to create a crime, and yet is not so explicit that all men subject to its penalties, may know what acts it is their duty to avoid, and the said Act contains no definitions or criteria by which the acts unlawful thereunder are defined, or are ascertainable. 3. Because the said indictment, or any one of the three counts thereof, does not charge any offense against these Defendants, or any of them. 4. The first count of the indictment is bad, and Defendants demur thereto because it does not allege that any act of any kind was done by these Defendants, or any of them. 5. Defendants further demur to the said first count because, if it had been alleged that Defendants, or any of them, did the acts or things mentioned in the count, no one of them would have constituted an offense under the law invoked by the Government. 6. Because the acts and things mentioned in the first count, by which it is charged that the restraint of trade and commerce, amongst the several States and foreign nations, were to be effected, are stated with such vagueness and incompleteness as not to advise these Defendants of the character of the charge. 7. Defendants demur to the second count of the indictment upon the grounds set forth in the 4th, 5th and 6th grounds of this demurrer with reference to the first count, Defendants making to the second count the same objections. 20. The said indictment is bad in that it unde-

takes to make out of the same overt acts, or specifications, three distinct counts and a number of distinct offenses. 21. Defendants demur to each and every one of the specifications in the said three counts, and to each of the said three counts, upon the ground that they are utterly lacking in fullness, specifiveness and definiteness as to time, place and circumstances, parties and description generally, and do not in any of these particulars so advise the Defendants as to give them an opportunity to prepare to meet such charges."

Objections to the evidence relied on are to be found on pages 46 and 47 of the Record. We contended in the Court below, and now contend, that the alleged specifications were a part of the conspiracy agreement charged, and had to be so shown, that the case stood just as if it had been alleged that a written conspiracy agreement was entered into which included, as parts of the agreement, the doing of the things specified, and that, therefore, the agreement, as laid, had to be proven. Against our objections, the Court admitted evidence designed to show that these things were done, just as if they had been laid in the indictment as overt acts and the indictment had not been confined to the agreement set up in the indictment. We objected to the introduction of testimony concerning the contract between the West, Flynn & Harris Company and the American, and the contract itself. This evidence was offered to sustain what might be called the fourth specification which, in the indictment, reads, "by coercing factors and brokers to enter into contracts with said Defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into." (Page 3 of the Record.) As amplified by the bill of particulars, required by the Court, the factors mentioned are the West, Flynn & Harris Company and the Consolidated Naval Stores Company, and, as stated in this fourth paragraph of the bill of particulars (page 27 of the Record), "the contracts relied on by the Government, in substance, required the storage of

naval stores receipts of such factors and brokers at naval stores terminals, owned, controlled or operated by the National Transportation Company. Duplicates of these contracts, the Government is advised, are now in the possession of the Defendants." We shall insist that the testimony utterly fails to show coercion in any legal, or other, sense. A charge, based upon this contention as to the West, Flynn & Harris Company, is made the subject matter of an exception upon the ground that it is without evidence to support it.

Similar objections are made to the testimony of Coachman and the contract with the Consolidated Naval Stores Company. This contract, we may say in passing, was made before the American was formed, and with the S. P. Shotter Company, a corporation not on trial, and which had been wound up prior to the finding of this indictment. The Court permitted the evidence of the contract to go in for the purpose of showing that the American Naval Stores Company coerced the Consolidated into "**entering into**" this contract. We also except to a charge based upon this evidence—a charge which submitted this specification for the consideration of the jury, and, as already noticed, it cannot be said that these parties were not convicted upon the ground that they entered into a conspiracy which contemplated the coercion of the West, Flynn & Harris Company or the Consolidated Naval Stores Company into entering into contracts with the American, and because they were guilty of the coercion alleged in the indictment.

We objected also to the admission of the testimony of the witness Hoskins, mentioned on page 65 of the Record. (We state, parenthetically, that these objections to evidence and all the points to be urged in this brief are covered by the assignments of error, to be found on pages 36 et seq.)

The purpose of this evidence was to sustain that part of what may be known as the seventh specification, which charges Defendants with "falsely gauging sprits of turpentine." It is a part of the general charge, reading in the

indictment as follows: "By fraudulently grading, regrading and raising grades of rosin, and **falsely gauging spirits of turpentine.**" The motion for a bill of particulars called for an amplification of this specification. The Court, in the seventh paragraph of its order, to be found on page 26, required the amplification there mentioned. The Government, in compliance with the order, undertook to amplify as to the raising of the grades of rosin, but made no allusion to the alleged false gauging of turpentine. In compliance with the second order the Government included alleged false gauging. (See page 28 with page 30 of Record). The purpose of the testimony of Hoskins was to show that more turpentine was taken out of the barrel than was proper. One of our objections to this testimony was that this, if done, could not be called false gauging. In addition to this, we except to a charge based upon this specification of the indictment upon the ground that there was no evidence to sustain it.

We objected to the evidence of O'Keefe and DeGroot (page 65 of the Record) upon the ground that they did not sustain, or tend to sustain, the allegation in the indictment. As amended by the bill of particulars, it is charged that re-grading was done by "employees of the National Transportation & Terminal Company and the American Naval Stores Company, acting under the direction of the respective managers of said companies' terminals, at the point named, and by divers other agents and servants of all of said Defendants, the exact names and character of said agencies being at this time to the Assistant United States Attorneys unknown." (Page 28 of the Record.) No effort was made to show that anything of this kind was done, save only at certain yards in Brooklyn, New York. The undisputed evidence shows that at the time when it is claimed this was done the naval stores did not belong to either Defendant on trial, was not on the yards of either Defendant, and neither the alleged manager nor the servants in the yard were in the employ of either Defendant. We insisted, therefore,

that the proof should be confined to the allegation, and now insist.

Other objections were made to the testimony of West, Flynn & Harris Company contract, of Coachman, the Consolidated Naval Stores contract, of Hoskins, O'Keefe and DeGroot, to the effect that all of such testimony was illegal and irrelevant and not sustained by any allegation in the indictment, and did not in any way tend to maintain a case under the statute. These points will be hereafter elaborated.

Exceptions to the charge also cover the points that the charge is not based upon any proof. These objections are now urged.

We insist, as we did in the Court below, that our motion to direct a verdict in favor of the Defendants should have been sustained. As already stated, we made the motion at the conclusion of the Government's case, and we repeated it after the testimony of the Defendants had been introduced. Defendants' testimony certainly did not in any way weaken the motion. This motion was made by the Defendants jointly and severally, and was "upon the grounds that the evidence did not justify a conviction as to the Defendants, or as to any one of them; that both counts were confined to the conspiracy agreement mentioned, and required proof that all of the specifications mentioned were a part of the agreement; that, as to some of them, particularly those touching the alleged circulation and publication of false statements as to naval stores production and stock in hands of producers and their immediate representatives, the alleged issuance and causing to be circulated and hypothecated fraudulent warehouse receipts, the alleged attempts to bribe employees of competitors and factors so as to obtain information as to competitors' business and stocks, no evidence of any kind had been offered, and, therefore, the proof failed as to these things being a part of the agreement; because the evidence showed that there was only one trader, and there was an entire absence of evidence as to any combination, alliance, agreement or understanding of any kind between

this trader and any other trader, and, therefore, no evidence of any violation of the act invoked by the Government; because there could be no conspiracy between the trader mentioned in the indictment, the American Naval Stores Company, through its officers, and, at the same time, with its officers, and because nothing had been shown that involved in any way a violation of the Act of Congress." (Pages 51 and 52 of the Record.) In the request to charge, the Defendants also ask a direction of a verdict in favor of each one of the Defendants, making a separate request for and in behalf of each one. (Pages 52 and 53 of the Record.)

It is not easy to state the points relied upon without repeating the assignments of error. Notwithstanding their length, we here repeat those bearing upon the requests to charge, and the charge as given.

These assignments of error are set out in pages 37 et seq. of the Record, and also in the bill of exceptions on pages 52 et seq. As relied on, they are thus stated and numbered, namely:

5. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "The Government has failed to make out, by legal evidence, a case against any of the Defendants, and it is, therefore, your duty to render a verdict for the Defendants."

(After this request there was a note to the effect that "if the above or a like request is given, all others are, of course, withdrawn.")

6. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against E. S. Nash, and it is your duty to find in his favor."

7. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has

been made out, by legal evidence, against S. P. Shotter, and it is your duty to find in his favor."

8. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence against J. F. C. Myers, and it is your duty to find in his favor."

9. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against George M. Boardman, and it is your duty to find in his favor."

10. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "No case has been made out, by legal evidence, against Carl Moller, and it is your duty to find in his favor."

11. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "In the opinion of the Court, the penal provisions of the statute invoked in this case are, in their meaning, uncertain and doubtful, and, therefore, they ought not to be enforced. It has been held by the Courts that, where there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a Court not to inflict the penalty."

12. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "Neither of the two counts before you charges that the Defendants did anything, but they are charged with a conspiracy to restrain trade and to monopolize trade, and by certain means mentioned in the indictment. It is the contention of the Government that it is not necessary to prove that all the means mentioned were a part of the conspiracy. It is the contention of the Defendants that it must be proven that all of these means were a part of the conspiracy. Where a Court

is in doubt as to the construction to be given to an indictment, that doubt must be resolved in favor of the Defendants. Therefore it is that the Court charges you (it being admitted that all the means mentioned in the indictment were not a part of the agreement, that is to say, no evidence has been shown that they were a part) that the case has not been made out, and it is your duty to acquit the Defendants."

13. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "It is alleged in both counts that the alleged conspiracy was formed by the Defendants in the Eastern Division of the Southern District of Georgia, and it is the duty of the Government to prove that the conspiracy agreement was entered into in this Division. No evidence being submitted to show that the conspiracy was entered into in this Division, and the evidence being entirely consistent with the fact that, if made, it was entered into elsewhere, it becomes the duty of the Court to charge you that the venue has not been shown, and you must, therefore, acquit the Defendants."

14. Because the said Court erred in refusing to give to the jury the following written instruction requested by these Defendants before the charge began, to-wit: "A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose in itself criminal or unlawful, by criminal or unlawful means.' One of the essential perquisites, therefore, for the Government to prove in this case is that two or more of these Defendants combined and agreed together, by concerted action, to restrain trade within the meaning of the law, or to monopolize trade within the meaning of the law. These words imply a meeting together, deliberation and purpose. The fact that two or more of them made an effort to restrain trade or to monopolize trade would not establish the charge made. In addition to this, you would have to be satisfied by the evidence, beyond a reasonable doubt, that they combined together, that is to say, mutually agreed together, to do this and to do it by concerted action.

In addition, you must find, by proof submitted, that such a conspiracy agreement was made in the State of Georgia, the Southern District of Georgia and the Eastern Division of this Southern District."

15. Because the said Court erred in refusing to give to the jury the following written instructions submitted by the Defendants before the charge began, to-wit: "The doing of anything a number of times, or repeatedly, whether you regard it as objectionable or not, would not be material in this prosecution, unless the evidence convinced you, beyond a reasonable doubt, that these things were done as a part and parcel of an unlawful conspiracy, and this conspiracy was fully proven. For example, it is charged in the indictment that the making of tentative offers was a part of the conspiracy. If there has been no evidence produced to show that any tentative offers were made, except to one customer, you would not be authorized to regard at all evidence of this character, whether you thought it proper or improper."

16. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, without any qualification, to wit: "It is charged in the indictment and specifications that bonuses were offered to cause postponement of deliveries, but the Bill of Particulars confines this to the case of the Lilly Varnish Company. You have heard the evidence of Mr. Lilly, the only witness produced on this line. Even if you find that his evidence makes out this charge, and you should attach any importance to the charge, you would not be authorized to find a conspiracy because of an isolated case like this." The Court gave this instruction, but added as follows: "With this qualification which I give you: Unless this fact, if it be a fact, and coupled with all the other evidence in the case, satisfies your minds beyond a reasonable doubt that two or more of the Defendants conspired to restrain interstate commerce or with foreign nations."

17. Because the Court erred in adding the qualification just mentioned in the preceding assignment of error.

18. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "What might be called the first specification, as amplified by the Bill of Particulars, is that a part of the conspiracy was the controlling, manipulating and arbitrarily bidding down and depressing the market price of naval stores, so that competitors and producers could not sell except at ruinous prices, and that this was done in Savannah, Jacksonville, New York, London, Liverpool and Hamburg, and it is further stated that the competitors affected by the price thus reduced were the J. R. Saunders Company, John A. Casey Company, James Corner & Sons and the Paterson Export Company. The Court charges you that no evidence has been introduced as to any of these alleged competitors except the Paterson Export Company, and even if it were proven that the charge was true as to the Paterson Export Company, this isolated instance would not justify a conviction of a conspiracy."

19. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The second specification with reference to the alleged conspiracy, as amplified by the Bill of Particulars, is 'that the Government expects to prove that the diversion of naval stores receipts referred to in the second paragraph of the Court's order was forced and coerced from the Ports of Fernandina and Jacksonville, Florida, and Brunswick, Georgia, to the Port of Savannah, Georgia, and that this was done by the Defendants themselves and by divers agents of the American Naval Stores Company and National Transportation and Terminal Company, at this time to the Assistant United States Attorneys unknown. Further that the naval stores thus diverted included both spirits of turpentine and rosin.' The Government is held to this charge, and it will be noticed that the alleged diversion is from the two Florida ports mentioned to the Port of Savannah. You cannot convict on account of this unless you find that what was done was improper, and that it was

done often enough to show a conspiracy, and that such a conspiracy was illegal and wrongful."

20. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The third specification reads as follows: 'By purchasing thereafter, at divers times, a large part of its supplies at naval stores ports known as closed ports, and wilfully and with the deliberate intent and purpose of depressing the market refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basic or primary market in the United States for naval stores, and the said Defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulf Port and Mobile on a basis of the market at Savannah.'

"There is no evidence before the jury as to the amounts of purchases from closed ports. Mr. Brown, a witness for the Government, testified as to purchases at the Jacksonville market—Jacksonville not being a closed port—and these purchases included those at Fernandina and Tampa, but there was no separation, and, for this reason, the proof has failed as to this, even should you find that what was done was improper and unlawful and a part of a conspiracy, such as the Court has charged you."

21. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The fourth specification charges that the Defendants 'coerced factors and brokers into entering into contracts with the Defendants for the storage and purchase of their receipts and refusing to purchase unless such contracts were entered into.'

"The only evidence offered on this line is as to the West, Flynn & Harris Company contract and one with the Consolidated Naval Stores Company. If you find that the American Naval Stores Company saw fit not to buy from either of these

parties, and these parties saw fit to enter into the contracts with them, whether they liked the contracts altogether or not, this would not be coercion in any legal sense and you could not regard such evidence. The contract of the Consolidated Naval Stores Company was not even made with this Defendant."

22. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "Under the seventh specification and the Court's order it is stated that the Government expects to prove that the practice of falsely and fraudulently raising the grades of rosin without re-inspections was carried on at Brooklyn, New York, Hamburg, Germany, Tampa, Florida, Jacksonville, Florida, Ludlow, Kentucky, East St. Louis, Illinois, and divers other places at this time to the Assistant United States Attorneys unknown. There has been no effort to show anything of the kind except as to a yard in Brooklyn, New York. The Court charges you to disregard evidences as to the Brooklyn yard. Acts alleged to have been done outside of the jurisdiction of this Court, and the Brooklyn yard would be outside of the jurisdiction, cannot be used as evidence of a conspiracy. In addition to this, the allegation in this seventh paragraph is that the alleged raising of grades without re-inspection was done 'under the direction of the respective Managers of said Companies terminals at the points named.' The undisputed evidence shows that these Managers were not connected in any way with the Defendant Companies now on trial, that is to say, the American Naval Stores Company of West Virginia, whose principal office is located in Savannah, and the National Transportation and Terminal Company of New Jersey. The evidence shows that the naval stores referred to by the Government's witness had become the property of the New York American Naval Stores Company, were on the yards of the New York National Transportation & Terminal Company, and the employees involved were employees of this latter Company and were not the employees of either of the Defendant Companies on trial."

23. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "An effort has been made by the Government to substantiate the charge of false gauging, alleged to have taken place on the yards of the National Transportation & Terminal Company at Jacksonville, Florida. Gauging means the measuring of a barrel for the purpose of ascertaining its contents. The taking out of spirits from a barrel after it had been gauged, whether this was properly or improperly done, would not sustain such a charge. When the Government makes a charge it must prove it strictly as made."

24. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The ninth specification charges the postponement of deliveries, and that the Lilly Varnish Company, of Indianapolis, and two German houses, mentioned in the ninth specification, were offered bonuses in order to postpone deliveries, and Bartels and another German party were threatened with a boycott. The Court charges you that there is no evidence before you to sustain this ninth specification as to these parties, and, therefore, you should disregard it, even although you should think there was anything unlawful or improper about it."

25. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "The eleventh specification charges the Defendants with selling naval stores at prices far below actual cost to themselves so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors, and the twelfth that the Defendants wilfully and arbitrarily fixed the price of spirits of turpentine in the United States below the cost of production. In the Bill of Particulars it is alleged that 'in the months of November and December, 1907, the American Naval Stores Company at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below

the cost of production; that said sales were made at New-ark, N. J., by the Manager of the New York City office of the American Naval Stores Company, and at Philadelphia, Pa., by the Manager of the Philadelphia Branch Office of the American Naval Stores Company, and divers other sales made at divers other places and on divers times to customers and by representatives of the American Naval Stores Company at this time to the Assistant United States Attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market according to this Bill of Particulars at those times depressed below the cost of production by the Defendants and in the manner specified in the first and second counts of the indictment."

26. Because the Court erred in refusing to give, without qualification, the following written instruction submitted by the Defendants before the charge began, to-wit: "A business corporation, like the American Naval Stores Company, has a perfect right to buy when and where it pleases and to refrain from buying when and where it pleases. It has a perfect right to refuse to enter into contracts, if it does not wish to do so. It has a perfect right to select its own customers and to refrain from dealing with people that it does not, for any business reason, care to deal with. Its failure to buy from a competitor may cause the competitor to fail but the law does not attempt to prevent anything of the kind. The Constitution of the State guarantees to traders the liberty of contract." The Court added, after giving this request, the following: "This is true, provided—this is the qualification which the Judge gives you: This is true provided that such corporations do not violate the interstate law or statute as I have explained to you in my general charge."

27. Because the Court erred in adding the qualification just mentioned in the preceding assignment of error.

28. Because the Court erred in refusing to give to the jury the following written instruction submitted by the Defendants before the charge began, to-wit: "If one trader,

be it a corporation or a natural person, by reason of larger wealth and resources, or other lawful advantages, can undersell a rival and put the rival out of business, or declines to deal with a rival, and thus put him out of business, there is no law against this. Such a power is an incident often of large means or greater business ability and skill, and the law does not attempt to interfere with such advantages." The Court added, after giving this instruction, these words: "Unless the methods and practices adopted for the control of interstate trade and commerce would result in restraint of such trade and commerce, which I have previously explained to you in my general charge."

29. Because the Court erred in adding the qualification just mentioned.

30. Because the Court erred in instructing the jury as follows: "Since the size of the business alone is not necessarily illegal, it is the crushing of competition by means of force, threats, intimidations, fraud or artful and deceitful means and practices which violate the law. You will consider carefully all the means which the indictment charges, and inquire, first, whether the Defendants or any two or more of them did, in fact, unlawfully combine, conspire, confederate and agree together to monopolize by acquiring such power over the disposition of rosins, turpentine and naval stores which were the subject of interstate and foreign commerce, so that they were capable of forming and did form a scheme to crush and stifle competition, and, second, if such scheme of gaining and controlling business was to be effected by the illegal methods of force, threats, intimidations, fraud, or artful and deceitful means and practices, which their competitors in such trade were necessarily unable to meet." Defendants contending that there was no evidence to sustain this charge, and that it is otherwise illegal.

The Court withdrew from the consideration of the jury only three of the twelve specifications, the three withdrawn being those as to false statements, the issuance and circulation and hypothecation of fraudulent warehouse receipts,

and the alleged bribery of employes of competitors. The Court submitted all the other specifications.

31. Because the Court erred in submitting to the jury all of the specifications mentioned in the indictment save only the three withdrawn, those three being those stated in the preceding assignment of error; Defendants contending that there was no allegation in the indictment or evidence to justify such submission to the jury, and that the doing of it was otherwise illegal.

32. Because the Court erred in instructing the jury as follows: "Conspiracies may be entered into in a very informal way, generally, in fact, in an informal way. The parties may not come together at all. They may be in different parts of the country, but if, by any means, by telegraph or letter, or by any means whatsoever, they may come to a mutual understanding for committing any offense against the Government, that would be a conspiracy." Defendants contending that this charge was unauthorized by the evidence and is otherwise illegal.

33. Because the Court erred in instructing the jury as follows: "The first count charges that the Defendants, the American Naval Stores Company, National Transportation & Terminal Company, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, unlawfully, knowingly and amongst themselves, combined, conspired, confederated and agreed together to restrain trade and commerce among the several States and with foreign nations. The first count sets forth twelve different means by which the alleged conspiracy in restraint of trade was to be carried into effect. As to three of these means, though, there has been no testimony. Evidence of certain alleged means has been submitted to your consideration for two purposes, first, as circumstantial evidence that the defendants formed a conspiracy, and, second, that such means naturally and necessarily tended or did cause restraint of interstate and foreign trade and commerce. It is the contention of the Government that they were parts and elements

of a scheme and design on the part of the Defendants to restrain trade; and you may consider all of the means on which evidence has been submitted as circumstances merely from which you may or may not conclude that there was such an understanding, that is, co-operation and design upon the part of two or more Defendants as would under all the rules I have given to you be sufficient to constitute a conspiracy between them, and this, as I have said, must be shown beyond a reasonable doubt. With this issue in view, you may consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy." Defendants contend that the charge just quoted was unauthorized by the evidence and otherwise illegal.

The Court added to this portion of the charge the following: "No evidence as to three of the means has been offered, and you should not consider them. Those are the charges of circulating and publishing false statements, charging the issuing and causing to be circulated and hypothecated fraudulent warehouse receipts, and the charge of attempting to bribe employees of competitors and factors to obtain certain information. Those are the means and matters alleged in the indictment on which there has been no testimony."

34. Because the Court erred in instructing the jury as follows: "One of the means charged is the coercion of factors and brokers into entering into certain contracts which you will recall. It will be well for you to understand the legal meaning of coercion. The word coerce means to restrain, by force, especially by law or authority, to repress; in the sense which now prevails it differs but little from the word compel, yet there is a distinction between them, coercion being usually accomplished by indirect means, as threats, intimidation, physical force being more rarely used in coercion. It imports, however, some actual or direct exercise of power possessed, or supposed to be possessed by the party who it is claimed so acted." The objection to this being that there was no evidence at all before the jury to show coercion, and the charge is otherwise illegal.

35. Because the Court erred in charging the jury as follows: "It is not necessary for the Government to prove that all the means charged were in fact a part of a single purpose and conspiracy by two or more of the Defendants, or that all of the means charged were in fact carried out by two or more of the Defendants. It is sufficient if it be shown beyond a reasonable doubt that some of those means charged were a part of the common scheme, design or understanding or conspiracy by two or more of the Defendants, and that these same means were of themselves sufficient to cause an essential obstruction and restraint of the free and untrammelled flow of trade and commerce between the States and foreign nations." Defendants contending that this charge was unauthorized by the evidence and is otherwise illegal.

36. Because the Court erred in instructing the jury as follows: "If you should find under these principles laid down that any of the alleged means were employed, and that the necessary effect of those means was to restrain interstate and foreign commerce, in considering whether these means or acts were a part or purpose of the several Defendants toward those means and acts and towards each other. If you should find beyond a reasonable doubt that certain acts were done or means employed, you may enquire who were responsible for those acts, whether any two or more of the Defendants were responsible, and whether such acts were the result of a pre-conceived plan for concert of action on the part of any two or more of the Defendants." Defendants contend that this charge was unauthorized by the evidence and is otherwise illegal.

37. Because the Court erred in charging the jury as follows: "A corporation, although an artificial being existing only in contemplation of law, is held to the same measure of liability as an individual and is entitled to the same rights of protection as an individual. A corporation acts through its officers, its directors and its agents. While one corporation cannot conspire with its own officers, directors or agents, it may conspire with another corporation, or with the officers,

directors and agents of another corporation. Corporations may conspire with individuals, as well as individuals may conspire with one another, they may conspire with another corporation; but you must bear always in mind that a corporation is only responsible for the acts of its agents while acting within the scope of their employment, or for such acts only as may have been authorized." The objection to this charge being that it is without evidence to sustain it and is otherwise illegal. The Defendants contended throughout the trial that the only trader mentioned in the indictment was the American Naval Stores Company, that all of the individual Defendants were alleged to be representatives of this company, three of them being also alleged to be representatives of the other corporation, and that there could not be a conspiracy to restrain trade or to monopolize trade by corporations through officers, and, at the same time, with officers, and the Court should not have submitted to the jury any theory which would have permitted them to have found any of the individuals guilty or either of the corporate Defendants.

38. Because the Court erred in charging the jury as follows: "The indictment charges that the Defendants conspired with divers other persons to the grand jurors unknown. If you find that any two or more of the Defendants conspired with any person not named in the indictment to commit the offense charged, you would be authorized under the rules laid down to find any two or more of the Defendants guilty under either or both counts." The objection to this charge being that it was without evidence to sustain it, and is otherwise illegal.

39. Because the Court erred in instructing the jury as follows: "Evidence has been introduced to the effect that two other corporations which are distinct from the Defendant companies existed in the State of New York at the time of the alleged acts. The Defendants companies are the American Naval Stores Company of West Virginia and the National Transportation & Terminal Company, al-

leged to be organized under the laws of New Jersey. The New York corporations were known as the American Naval Stores Company of New York and the National Transportation & Terminal Company of New York. Evidence has been introduced as to certain transactions or acts occurring on the yards in Brooklyn, N. Y., of this Transportation & Terminal Company of New York. The witness O'Keefe testified that he was employed by the American Naval Stores Company, and other witnesses testified that they worked at the yards in question. The witness Dill testified that he was the President of the National Transportation & Terminal Company of New York and the Manager of the American Naval Stores Company of New York, and that he employed O'Keefe for the National Transportation & Terminal Company of New York, and that the yards belonged to the National Transportation & Terminal Company of New York. You have heard the evidence as to the ownership of the rosin which entered this yard. If you find that the acts alleged by certain employees were done by employees of the New York corporation, and that these corporations were separate and distinct from the two Defendant corporations, and that such New York corporations did not conspire with either of these corporations as charged, with two or more of the Defendants, then you should not consider any of the acts which are charged to have occurred on the properties of these New York corporations, or the acts of employees or agents thereof. But if on the other hand the evidence satisfies you beyond a reasonable doubt that one or both of the New York corporations was in fact so owned, controlled, dominated and operated by one or both of the Defendant corporations, that it had the same officers, and it was in fact its business transactions for all practical purposes identical with one or both of the Defendant corporations, the New York corporation which you find so connected you may consider in connection with the Defendant. If you then further find that two or more of the Defendants conspired as charged with one or both of the New York

corporations to monopolize and restrain interstate trade and commerce, you would be authorized to find a conviction as to such Defendants; or if you find that the employees or agents of such New York corporation were in fact, as I have stated, employees or agents of one or both of the Defendant corporations named in this indictment, and such corporations, if you find them so identical, would be responsible for the acts of such employee or employees if they authorized them, or if they clearly ratified them, such wrongful acts subsequently knowing them to have been committed. But you must consider this evidence in connection with all the other evidence in the case, that is whether there was any conspiring between any two of the Defendants with either or both of the New York corporations or their agents or whether said New York corporations, or their agents and employees, were dominated, directed and controlled by any two of the Defendants, and that such acts or means alleged to have been committed at the Brooklyn yards were ratified by any two or more of the Defendants."

The objection to this charge being that it was unauthorized by the evidence and is otherwise illegal.

40. Because the Court erred, at the conclusion of its charge, instructing the jury as follows: "The conspiracy, the venue of this offense will be where the conspiracy was formed; but a conspiracy may be formed by individuals residing in different States, or it may be carried from one district to another, if the objects and purposes of that conspiracy has a means for transporting or been committed in another district than that which it was formed."

The objection to this charge being that it was unsupported by the evidence and is otherwise illegal.

50. Because the Court erred in charging the jury as follows: "All the means and all the illegal acts which the indictment charges must have been done within three years prior to the finding of this indictment. Any acts beyond this period you would not consider."

The said charge being illegal in that it permitted the jury to consider the acts alleged to have been done prior to the incorporation of the American Naval Stores Company, the only trader mentioned in the indictment, and prior to February 11th, 1907, when it appeared that the Defendant, S. P. Shotter, was indicted under the same Act and plead guilty thereunder, and prior to the limitations fixed by the Bill of Particulars.

In our Brief of the Argument, we will deal more specifically with a number of these points.

We also insist upon the Motion in arrest of Judgment to be found on page 33 of the Record, and upon the grounds there stated to the effect that the verdict is incomplete and void and no valid judgment can be entered up thereon in that the five Defendants convicted, and three other Defendants, were jointly indicated and jointly tried and the verdict rendered found these Defendants guilty, found C. J. De Loach, another Defendant, not guilty, and made no finding, return or report of any kind as to two of the Defendants indicted and tried, namely, the American Naval Stores Company and the National Transportation & Terminal Company, because the jury was discharged without agreeing upon a verdict as to all of the Defendants and without reporting that they were unable to agree and assigned no reason for not agreeing as to the other Defendants, the two corporations, and no valid judgment can now be entered up as to these five Defendants, or any one of them; and because no one of these five Defendants could be found guilty as to either the first or second count of the indictment, with no finding as to either of the corporations named, all of these Defendants being alleged in the indictment to be officers or agents of the American Naval Stores Company, and two of these Defendants (Myers and Moller) being also alleged to be connected with the other corporate Defendant, as stated in the indictment, and these Defendants, and all of them being charged with conspiracy to restrain trade, and

conspiracy to monopolize trade for and in behalf of the only trader mentioned in the indictment, and the only party alleged to be connected with interstate or international commerce, namely, the American Naval Stores Company, and they could not be found guilty and the corporations eliminated from the case, particularly the American Naval Stores Company. The facts bearing upon this motion in arrest appear, not only in the motion verified by one of the Defendants, whose statements are undisputed, but also in the statement of facts in the Bill of Exceptions on page 66 of the Record.

BRIEF OF THE ARGUMENT.

STATUTE BAD AS A PENAL LAW.

1. The statute invoked by the Government is bad as a penal statute, and the grounds of the demurrer making this point should have been sustained.

This proposition does not assail the constitutionality of the legislation. It is not necessary to do this. The principle involved is a common law principle, inhering in the very definition of law, and exists independently of a constitutional provision, although the provision in the fundamental law is cognate with the principle. The point had never been passed upon by any Court so far as we can ascertain, in any criminal case.

Except only in the case of *Tribolat vs. The United States*, determined by the Arizona Supreme Court, reported in 95 Pac. (a case which we will hereafter notice) and that of *U. S. vs. Union Pacific Co., et al.*, 173 F, 337, (in which the judgment of conviction was set aside), we have not been able to find a case where an individual Defendant, who has gone to trial, has ever been convicted of a violation of this Act, or one where a conviction against any Defendant has been sustained by an Appellate Court. As noticed, in one of the two cases just mentioned, the conviction was not sustained.

We contend that the law is bad as a penal statute, because it is not sufficiently definite and explicit to advise parties what they may and may not do under the law.

Before noticing this specifically, we submit that the constitutionality of this legislation, even so far as its civil provisions are concerned, has never been so passed upon as to foreclose this proposition in the present case.

In an attack upon its constitutionality the question is not whether Congress could penalize the making of a particular contract in any case, or an alleged monopoly specified in any case, but whether the language of the statute is too broad in view of constitutional limitations guaranteeing liberty of contract, due process of law, and definiteness and specificity in a criminal charge against a person accused of crime. As said by this Court in *United States vs. Ju Toy*, 198 U. S. 262: "The relevant portion" (of a statute) "being a single section, accomplishing all its results by the same general words, must be valid as to all it embraces or altogether void. **An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again.**" (Italics always ours unless otherwise stated).

In *United States vs. Delaware & Hudson Co.*, 213 U. S. 405, the Court, through the present Chief Justice, observes: "True, the Government, in argument, suggests that the radical result of the statute may be arranged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation."

If, for example, it is not in the power of Congress to prohibit competitors, engaged in interstate commerce, from forming a co-partnership, although its chief purpose may be to discontinue their competition, and such a contract is within the terms of the statute, the Courts cannot by construction make an exemption as to this contract so as to save the statute. It will be observed that the first section of the Act,

in sweeping language, forbids and subsequent section penalizes **"every** contract in restraint of interstate or international trade."

In the leading case of United States vs. Reese, 92 U. S. 219, the Court says: "A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath, and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion." On the next page, the Court says: "Penal statutes ought not to be expressed in language so uncertain. **If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.**" On the same page the Court observes: "It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc." On the next page the Court says: **"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The Courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the Courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the Courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."**

This objection to the constitutionality of a statute seems not to have been passed upon. In the Joint Traffic Association Case the constitutionality of the law is noticed, but the Court observes that this objection was not advanced in the arguments in other cases. (171 U. S. 559). On pages 566, et seq., the Court makes observation as to the constitutionality of the Act, and shows that there must be a number of contracts which really restrain trade, whatever their purpose, and which really monopolize, to some extent, interstate trade, with which Congress has not dealt and probably could not deal. On page 569 it thus states the question: "Has not Congress with regard to interstate commerce, and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law or competition? We think it has." We submit that this question does not state our proposition, which is that the law being, by its terms, too broad and applying to contracts which Congress could not lawfully prohibit, cannot be restrained and limited by judicial construction so as to make it harmonize with the Constitution.

Our point now is, however, that the law is bad as a penal statute, whether enforceable on the civil side of the Court or not.

In the common case of a seller agreeing not to compete with a purchaser, when he sells his stock of goods and business, his contract would be enforceable on the civil side of the Court, provided the restraint of trade be reasonable, as to time and place, but if the Legislature were to undertake to punish a man criminally if, perchance, it were determined that a contract was not in reasonable restraint of trade, another and a different proposition would arise.

Our contention is based upon the principle contained in the legal maxim "*Ubi jus incertum, ibi jus nullum.*"

In connection with the statute, we refer to the following authorities:

Railroad vs. Dey, 35 Federal, 875, 876. (This decision is by Judge Brewer, and deals with the law which penalizes the charging of an **"unreasonable rate."**)

U. S. vs. Sharp, 27 Fed. Cases, pages 1041, Par. 7, and 1043 (Judge Washington in this case deals with the law of "making revolt." This case is cited by Judge Brewer in Railroad vs. Dey).

The Enterprise, 8 Federal Cases, 732 (2). (A case also cited by Judge Brewer).

Tozer vs. United States, 52 Federal, 917. (This decision, also by Judge Brewer, deals with the **"undue preference"** clause of the Interstate Commerce Act and reverses the same case reported in 39 Federal, 904).

U. S. vs. Brewer, 139 U. S., 288. (This case holds "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." After citing United States vs. Sharpe, the Court then continues: "Before a man can be punished, his case must be plainly and unmistakably within the Statute.")

McChord vs. L. & N. R. R., 183 U. S., 498 and 499. (This case quotes with approval the decision from a Kentucky case which holds that a **penal statute could not be enforced for want of certainty that undertook to punish the charging of a rate which was not just and reasonable.** The language of the Kentucky Court, quoted on page 499 of 183 United States, is "The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.")

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L. & N. R. R. vs. Railroad Commission, 19 Federal, 679, (3), and pages 690, 691, 692 and 693. (This decision is by Judges Baxter and Hammond and Key. It deals with the requirements as to "just and reasonable rates.")

Cook vs. the State, 59 N. E., 489, 490 and 491; 2 Andrews American Law, page 1690, section 902; *Swift vs. U. S.*, 196 U. S., 396, where the court observes: "On the other hand, we are equally bound by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt." This principle is equally applicable to a case where an uncertain law puts in peril the business and conduct of a man, even although he may be anxious to observe the law.

U. S. vs. Wiltberger, 5 Wheaton, 95. (In this case the Court, through Chief Justice Marshall, said, "It is the Legislature, not the Court, which is to define a crime and ordain its punishment.")

We do not overlook the decision in *Waters-Pierce Oil Company vs. State of Texas*, 212 U. S., 86, where the Court would not interfere with the decision of the Texas Courts, sustaining the Anti-Trust Laws of Texas when assailed upon the ground that they were unconstitutional as depriving a party of due process of law because they permitted a conviction on account of acts which tend, or are reasonably calculated, to restrain trade and prevent competition.

On page 109 the Court notices some of the decisions cited by us, but does not question their soundness and is careful to say: "But the Texas statutes in question do not give the broad power to a Court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable as do the statutes condemned in the cases cited." It notices the word "tend,"

and correctly says that it is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. After noticing several cases, the Court says, on page 111: "It is true that the decisions quoted are in civil cases involving contracts and arrangements held invalid when attacked in proceedings in equity, and did not involve penalties such as were imposed in the case now under consideration," and then adds "And it is to be remembered that we are dealing with an Act of the Legislature, sustained in Courts of the States, with reference to its validity in view of the prohibitions of the Federal Constitution against deprivation by State action of liberty or property without due process of law. In this case the Defendant has had a trial in a Court of Justice duly established under the laws of the State, the question of its liability has been submitted to a jury. The judgment has been reviewed in an Appellate Court, and the correctness of the findings of fact and rulings of law in the lower Court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the Court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden." In the conclusion of its decision, the Court says: "Remembering, as we have had frequent occasion to say, that our province in this case is limited to an examination of objections arising under the Federal Constitution, we are unable to find in this record any ground for reversing the judgment of the State Court."

This case, therefore, is not inconsistent with our contention and with the authorities relied on by us.

The Judge of the Court below, in his opinion overruling our motion to direct a verdict, states (page 32 of the Record): "**Owing to the distressing uncertainty of the penal sections of the act under which the prosecution is maintained, it is difficult to say what acts or conduct would come within the purview of the statute.**" And again he observes: "**Just**

what acts or conduct may amount to a violation of sections one and two of the act, or what facts or circumstances would legally incur the penalties thereof, may indeed be a doubtful legal problem."

We submit that the logical result of such a view by Judge Sheppard was to sustain our demurrer to the indictment, and Mr. Circuit Justice Livingston is right when he holds, as he does, "that where there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning it is the duty of the Court not to inflict the penalty." (The Enterprise 8 Fed. Cases 732, 734 and 735.) If a Court finds the uncertainty of the penal section to be "distressing" and finds it difficult to say, after full argument by counsel, what acts or conduct would come within the purview of the statute, it is wrong, we submit, fundamentally wrong, to punish any one under such a statute in advance of amendments which will remove these serious objections. Under the authorities cited, it is of the essence of injustice to punish a man under such a statute.

The opinion in *Czarra vs. Board of Medical Supervisors of the District of Columbia*, to be found in the *District of Columbia Appeal Cases*, Volume 25, page 443, is illuminating on this general question. It reviews at length a large number of authorities involving criminal cases, and shows "that where the Legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible, **but also others which it is unreasonable to suppose were intended to be made criminal**, the statute will be declared void for inconsistency."

The decisions in the Standard Oil and American Tobacco Company cases, reported in 221 U. S., in principle, sustain our proposition that the statute is bad as a penal law.

These leading cases announced no new construction of the legislation. It never had been held by the majority of

the Judges of this Court that the law applied to every contract in restraint of trade, whether reasonable or unreasonable. On the contrary, a majority of the Judges had held the other way. If their different opinions in the former cases be considered, this conclusion is unavoidable.

In the second volume of his Autobiography, page 22, Senator Hoar (who took a large part in framing this legislation) says concerning it, among other things: "It was expected that the Court, in administering the law, would confine its operations to cases which are contrary to the policy of the law, treating the words "agreements in restraint of trade" as having a technical meaning, such as they are supposed to have in England." He then goes on to say the Supreme Court of the United States went in this particular farther than was expected. But in this he was in error. The cases that had then been decided dealt with contracts that would have been necessarily held in restraint of trade upon the assumption that the law applied only to unreasonable restraint of trade, and, therefore, this exact question was not involved in the facts of those particular cases. The majority of the Judges, had however, held that the law did not apply to contracts in reasonable restraint of trade.

By reference to the Standard Oil Company case, particularly to pages 59, et seq., it will be found that the Court confined the law to "undue" or "unreasonable" restraint of trade. This view makes exactly applicable the cases heretofore cited by us to sustain our contention.

It is true that on pages 69 and 70, of 221 U. S. this Court deals with the suggestion that "in view of the generality of the statute, it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power," but the Court was dealing with a civil case, and not with the penal provisions of the law. As already noticed, a law providing for the enforcement on the civil side of the Court by an action for damages, or by injunctive remedies, of a contract that might be held

to be in reasonable restraint of trade would be valid, but it is a non sequitur to say that it would be competent for the Legislature to provide that a man would become a criminal and be subject to confinement in the penitentiary if, perchance, he stepped beyond the line, no matter how innocently, and did something which a jury might find was an unreasonable, or undue, restraint of trade.

We submit that cases of fraud are not analogous, because fraud necessarily involves bad faith, and every sane man is presumed to know that he is doing wrong when he does something that is fraudulent, but a law-abiding and honest man may innocently do something which would infract this statute and make him subject to confinement in the penitentiary. Different juries of equal intelligence might very well come to different conclusions on identically the same facts, acquitting in one case and convicting in another. Using the language of another "Whether a party has been guilty of a fraud depends upon certain sharply defined moral principles, upon which as plain matters of right and wrong all reasonable people are in accord and which are therefore axiomatic, but in determining what is reasonable, as affecting favorably or adversely the public welfare, the Court must enter upon the whole vast domain of economics."

The situation seems to be correctly summed up in 2 Cook on Corporations, 6th Edition, pages 351, 352, where the author, after considering this legislation, thus states his conclusion: **"The result is that the application of the statute seems to rest largely in the discretion of the executive and Judicial departments of the Government, a situation which is hardly consistent with the theory that our Government is a Government of laws."**

As well said by Lewis in his work on Sutherland's Statutory Construction, Volume 2, Section 520: "The penal law is intended to regulate the conduct of people of all grades of intelligence, within the scope of responsibility. It is, therefore, essential to its justice and humanity that it

be expressed in language which they can easily comprehend; that it be held obligatory only in the sense that all can and will understand it. And this consideration presses with increasing weight according to the severity of the penalty."

As well said by Judge Tucker in his great work on "The Constitution" (Vol. 2 p. 448), "there can be no crime in an act where it is done through inadvertence, or mistake, or misjudgment."

Many cases are within the terms of the Act and are yet necessarily adjudicated to be outside of the pale of its condemnation, the Courts being obliged to limit its terms. The result is that each case turns upon its own facts and circumstances, and it has been established that the Act fails to define what contracts are in restraint of trade and what acts really violate the purpose of the monopoly section, and that no rules or tests have been laid down, or can be, to determine what may, or may not be done, and the Courts are thereupon called upon to do what Chief Justice Marshall says it is not their province to do, namely, to define the crime, and thus to take the place of the law-making power.

A sale of goods with restriction as to the right of the seller to compete with the purchasers may not be inimical to the Act. Many of such sales are consistent with it, as construed by the Courts, although in restraint of trade and tending to monopoly, and yet great uncertainty exists in this class of cases, and each must be determined by no known rule but by the facts and circumstances appertaining to the particular case.

See Cincinnati Packet Co. vs. Day, 200 U. S., 179, 184, and 185; Shawney Compress Co. vs. Anderson, 209 U. S., 434, 435; Gibbs vs. Gas Co., 130 U. S., 396, 409.

When the question was before the Court in the Northern Securities case, we cannot see how it can be said that it was there determined that the common law test, that a contract must be in unreasonable restraint of trade, does not apply to this legislation. As appears from the quotation from Senator Hoar's Autobiography it was intended by the framers of the bill that this test should be applied.

Even if this element of indefiniteness were not in the legislation, there are other elements of uncertainty and indefiniteness about the Act which make it equally amenable to the objection we now make to it as a penal statute.

The Courts have been obliged to open the door and recognize that there are contracts, which, although within the terms used, are yet not punishable thereunder. See, for example, the decision in *United States vs. Joint Traffic Association*, 171 U. S., pages 566, 567 and 568. Among other things, the Court says that "the effect upon interstate commerce must not be indirect or incidental only."

This raises a test of pronounced uncertainty. One jury may conclude, in a particular case, that the effect of a contract is only indirect or incidental, and, therefore, acquit a defendant charged with a violation of the law. Another jury, equally intelligent, may conclude, under substantially the same facts, that the effect was direct and not incidental, and, therefore, convict a defendant.

The Court also observes "An agreement entered into for **the purpose** of promoting the legitimate business of an individual or corporation, with **no purpose** to thereby affect or restrain interstate commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

What can be more uncertain than the question as to whether

an agreement is entered into **for the purpose** of promoting legitimate business with no **purpose** to affect or restrain interstate commerce? Different juries, of equal intelligence and character, might come to variant conclusions in passing upon substantially the same facts.

We are reminded of the observation of an English Judge, in passing upon the question as to whether a contract is in unreasonable restraint of trade when he said: 'It is an unbridled horse, which, when you have once mounted it, you know not whither it will go, or where it will land you.' " See in this connection remarks of the Supreme Court of Georgia in the case of *State vs. Central Railway Company*, 109 Ga., 723 and 724, quoting, approvingly, *Spelling on Trusts and Monopolies*, p. 224.

This Court has said before the *Standard Oil and Tobacco* cases that the construction must be reasonable, but the trouble is the Act, by its lack of definitive terms, makes this a jury question.

Under the decisions cited by us, an Act would be bad that undertakes to penalize a railway company for charging an "unreasonable rate." There is no ambiguity about the words. We know what "unreasonable" means, and we know what "rate" means. But the difficulty is that such an Act makes a man's guilt or innocence turn upon the variant views and moods, and prejudices and whims, of juries, some of them intelligent and some of them not. Under the authorities, an ordinance by a city undertaking to punish for excessive or unreasonable speed would be a bad law, not because there is any ambiguity in the words used, but for the reasons indicated.

On page 567 of this decision, the Court recognizes that a contract of partnership would not be violative of the Act, and yet such a contract is strictly in restraint of trade. It is difficult to conceive of one more so. Two or more individuals are in active competition in interstate trade; they may be the chief competitors in their locality, and they conclude to combine and form a co-partnership or corporation, the principal motive

being to get rid of their competition. Such a contract, under the decisions, does not come within the inhibition of the law, yet it plainly comes within its terms. The restraint of trade is more complete and more permanent than it would be if one of them agreed, in consideration of money paid, not to compete with his rival and to help him secure a monopoly of the business for a term of years.

In *Hopkins vs. United States*, 171 U. S., 592, the Court says: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. * * * There must be some direct and immediate effect upon interstate commerce in order to come within the Act." On the next page the Court cites various agreements which, in its opinion, would not be obnoxious to the Act.

In *Anderson vs. United States*, 171 U. S., 604, the Court passed upon the agreement there mentioned, which involved conformity to certain rules made by traders. One of them prohibited the recognition of a yard trader who was not a member of the Exchange; another inhibited the employment of any person to buy or sell cattle unless such person held a certificate of membership, and still another provided that "no member of this Exchange would be allowed to pay any order buyer, or salesman, any sum of money as a fee for buying cattle from or selling cattle to such party," that is, a party not a member of the Exchange. The Court held that it was not called upon to decide whether the Defendants were, or were not, engaged in interstate commerce, "because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize such trade within the meaning of the Act." On page 616 the Court recognizes that there are business agreements which affect interstate trade or commerce which are not within the Act as the Court construes it, and that such agreements must be held to be good. "Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely

be said to, in some obscure way, affect that commerce and to be therefore void."

See also the case of *Bement vs. National Harrow Co.*, 186 U. S., 92, where the Court holds that "the statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the Act we have no doubt was never contemplated by its framers." And yet the agreement before the Court was fully within the literal terms of the Act.

In *Addyson Pipe & Steel Co. vs. United States*, 175 U. S., 244, the Court uses this significant language: "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. **All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.**" These views, particularly the part of the excerpt italicized, emphasize the uncertainty of this legislation.

In *Continental Wall Paper Company vs. Louis Voight & Sons Company*, 212 United States, 228, the majority of the Court cites this last case and holds that "in determining whether a contract amounts to a combination in restrain of

interstate trade in violation of the Act of June 2nd, 1890, all the facts and circumstances will be considered." We insist that intelligent juries, who are charged the principles recognized by the Supreme Court of the United States, might well come to different conclusions upon substantially the same facts, and, when this is true, the Act is without the certainty required of a penal statute.

Attention is invited to the discussion of this Act by Spelling in his work on Trusts and Monopolies, and to pages 221, 222, 223 and 224. Among other things, the author says: "But if the Fifty-first Congress had deliberately conspired to gain credit for striking a blow at the trusts under false pretenses, it could not have succeeded better than by passing the erroneously prefixed Anti-Trust Bill approved July 2nd, 1890." He refers to the vague and general language used.

Again, on page 223, he says: "But the most serious defect, and one which is inherent in every line and section of the Act, is the failure to specify what acts and agreements shall constitute restraint of trade, monopoly, trusts, etc. It is as if an Act should provide that any person guilty of long-continued idleness should be punished as a vagabond, without defining either long-continued idleness or vagabondage, these being terms unknown in a criminal sense to the laws of the Federal Government. It is worse than useless to rely exclusively upon criminal and penal statutes and prosecutions under them, nor is it worth while to legislate in glittering generalities, and leave the Courts a task of construction and inference in order to arrive at their meaning."

In 2 Eddy on Combinations, pages 886, 887, 888, 889, 897, et seq., 919, 993, the author, in strong language, calls attention to the fatal defects of the legislation. On page 886 he says: "The Supreme Court itself, although holding specifically that the Act embraces all contracts in restraint of trade, whether legal or illegal, reasonable or unreasonable, has said that the Act does not embrace a very large class of contracts which fall within the strict definition of the phrase 'contracts in restraint of trade.' In the same case wherein the Court held that the

Act embraces all contracts in restraint of trade, it referred at some length to contracts entered into in connection with the sale of property or of a business—contracts wherein the seller bound himself to refrain from competing with the purchaser—and said: ‘A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question.’ ” (The author refers to *United States vs. Trans-Missouri Freight Association*. We have heretofore cited another decision of the Supreme Court on the same line.) “It is apparent, therefore, that the statute does not include a certain class of ‘contracts in restraint of trade,’ and this class embraces nearly all the contracts known to the law under the strict definition of the terms; in fact, the very phrase, ‘contract in restraint of trade,’ finds its origin in the class of contracts excepted by the Supreme Court from the operation of the Act.” On the next page the author notices: “But such contract would be void under the Act in question, if the sweeping dictum of the Supreme Court, that the Act embraces every contract in restraint of trade or commerce, is applicable. The Court, however, has noted, as already shown, a very large exception to the general proposition that the Act embraces every contract in restraint of trade, and it is believed that many contracts in restraint of trade, which very materially affect interstate commerce, as they come before the Federal Courts will be enforced in every case where the restraint imposed is no greater than the protection of the obligee reasonably requires. In short, as regards interstate or foreign commerce, it is believed that the law of contracts in restraint of trade as hereinbefore laid down is neither completely superseded nor materially affected by the anti-trust Act.

“The proposition that the law embraces all contracts in restraint of trade or commerce, whether reasonable or unreasonable, legal or illegal, is destroyed by the admission of

a single exception, and certainly the exception of an entire and well-known class of contracts in restraint of trade is fatal. If the Act does not embrace all contracts in restraint of trade or commerce, those which are covered by the Act must be distinguished from those which are not by something more than an arbitrary classification."

After an exhaustive summary of the Act, the author says, on page 897: "It is clear from the foregoing summary that literal effect cannot be given to the provisions of the Act; nor can the Act be so construed as to give distinct effect to each of its provisions."

On pages 888, et seq., he shows how impracticable it is to give effect to the language in its literalism, and says, on page 900: "**The Court which attempts to give them any effect is apt to indulge in judicial legislation.**"

These authors were not attempting to show that the Act was invalid as a penal statute. Their observations concerning the Act are opposite to our contention and illustrate it.

"Misera est servitus, ubi jus est vagum aut incertum."

THE INDICTMENT IS BAD IN SUBSTANCE.

Objections to the indictment were duly made by demurrer. See Transcript of Record, Pages 13, 14, and 15.

As held in the case of *Clement vs. United States*, 149 Fed. 306 (Headnote 6), by the Circuit Court of Appeals for the Eighth Circuit: "While the accused may raise the question of the sufficiency of the indictment to charge a public offense by motion in arrest of judgment, it is better practice to raise the question by demurrer." This Court has several times indicated the same view.

By reference to the bill of exceptions, to be found in the Transcript of Record, Pages 50 et seq., it will be ascertained that all of our assignments of error have been duly verified by the trial Judge, and that all of them are properly before this Court.

We submit that indictment is bad in substance, and alleges no offense under the legislation invoked by the Government.

As already noticed the trial Judge struck the Third Count of the indictment, and therefore only the First and Second Counts are before this Court. (Record, Page 16).

The formation of the American Naval Stores Company was not assailed in any way.

The indictment is consistent with the fact that this Company was organized lawfully for lawful and proper purposes. It proceeds upon the theory that after the formation of the American it increased its gains by improper practices, and thus, in some way not clear to us, has violated the Anti-Trust Act.

We submit the following objections to the indictment:

1. **No overt act of any kind is alleged.**

If the indictment be valid, then if two or more parties were to enter into an agreement, which if carried out would violate this law, and yet immediately abandoned it, without doing anything at all that was unlawful or hurtful, they might be sent to the penitentiary for merely forming the agreement.

As already noticed, according to both Counts, the alleged unlawful agreement made a part of the agreement the use of the twelve means set out in identically the same language in both Counts. It states that the conspiracy was "**to be effected** among other ways as follows," and then the twelve different ways or means by which the alleged conspiracy was to be accomplished are set out.

The position that it is not necessary to aver or prove any overt act is entirely inconsistent with the spirit and genius of our law. It would be opposed to the spirit and intent, if not to the letter of Section 5540 of the Revised Statutes. As said by the Court in *Bannon & Mulkey vs. United States*, 156 U. S. 469: "If such were not the law" (the law which requires an allegation that something was done in all cases of conspiracy), "indictments for conspiracy would stand upon a different footing from any others, **as it is a general principle that a party cannot be punished for an evil design unless he has taken some steps towards carrying it out.**"

In this connection we refer to the observation of Mr. Justice Field, in *U. S. vs. Reichert*, 32 Fed. 145.

It would certainly be anomalous if in all other cases of conspiracy, even in those involving conspiracies to commit capital offenses, and other offenses of great magnitude, it is necessary to aver the overt act, and the fixed policy of the law is to give a locus poenitentiae, and yet in a conspiracy case of this character (as to which we may safely say that the requirement of penal statutes recognized by this Court in *United States vs. Reese*, when it says "every man should be able to know with certainty when he is committing a crime," is not observed and carried out) no overt act need be alleged, the locus poenitentiae may be denied, and men may be convicted of a penitentiary

crime simply because they have formed the agreement, no matter how promptly and honestly abandoned.

2. The indictment is bad because it does not charge that the trader mentioned had any combination, alliance, or agreement of any kind with any other trader.

As already noticed, the indictment mentions only one trader, namely, the American Naval Stores Company, and as to this trader is careful to state in both counts that "it was during all of said time engaged in trade and commerce among the several States of the United States, and with foreign nations, within the true intent and meaning of the Act of Congress approved July 2nd, 1890, entitled 'An Act to protect trade and commerce against unlawful restraint and monopolies;' that is to say, was engaged in buying" etc.

All that the indictment amounts to is that this trader and its officers, and another corporation mentioned in the indictment, the National Transportation and Terminal Company, which appears by the indictment not to be in trade at all, and its officers (three of the same officers as those of the trader), entered into an agreement to secure all of the trade in naval stores, and as part of this agreement to use the means which the Defendant claims were used and were improper and reprehensible. We repeat that the indictment does not attack the formation of this trading corporation, or the purpose of such formation.

It proceeds also upon the theory that a corporation can conspire through its officers, and at the same time conspire with its officers, these officers not being connected with the alleged conspiracy save as officers.

The indictment is careful to set out the connection of these Plaintiffs in Error with the trading corporation, all of them being representative officers, save only Carl Moller, who is alleged to be "the Manager of the Jacksonville, Florida, branch, and an agent and employee of said Com-

pany." **By no possibility could these individuals be actual or potential competitors of the corporation represented by them.** In *Whitwell vs. Continental Tobacco Company*, 125 Fed. Rep. 460, the Circuit Court of Appeals for the Eighth Circuit (the same eminent Court which decided the *Northern Securities Company Case*, and of which Mr. Justice Van Devanter was then a member) says: "Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination or conspiracy in restraint of trade, between an employer and its employe, no such contract, combination or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the Defendant is their combination to make sales of commodities of the Tobacco Company profitable to purchasers to those persons who refrain from dealing in the wares of their competitors. **The two defendants in this case have never been and never intended to be competitors.** There has never been any competition, actual or possible, between them and hence no competition between them is or can be restrained by their combination to conduct the trade of the Tobacco Company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices or their goods and the terms at which they would dispose of them to all intending purchasers."

We have before us the able address of the Attorney General before the Michigan State Bar Association, on the 6th of July, 1911, in which he says (latter part of page 9 of the pamphlet) "It was not alone the acquisition of a large share of commerce among the States and with foreign nations, upon which the Court" (referring to the decision in the *Standard Oil Case*) "predicated the conclusion of unlawful combination and monopolization, but the attainment of

dominion over a substantial part of that commerce by means of inter-corporate stock holdings in actually or potentially competing corporations, accompanied by the exclusion of competitors, and attended with continued acts evidencing an intent and purpose to retain controlling power over the business and to exclude and suppress all competition with it."

The mere size of the business, even although it may go to the extent of acquiring all the business in a particular line, does not show any violation of the statute, and is not even any real evidence of violation. Dealing in some articles of interstate commerce, because of the smallness of the demand, must amount to a practical monopoly in order to be remunerative.

There can be no violation of the law in an effort on the part of a trader to secure all of the business in his line. Generally, the purpose of every enterprising trader is to secure all the business that he can, whether this be to the loss of his competitors or not. Usually it is true that one trader's gain is another trader's loss.

In *United States vs. E. C. Knight Co.*, 156 U. S., pp. 16-17, the Court says: "Congress did not attempt thereby" (referring to the Act of July 2, 1890) "to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several States or with foreign nations." The indictment in the case at bar does not allege any combination of any kind among traders, or any contract among traders, or any conspiracy among traders.

As this point also bears materially upon our motion to direct a verdict, we ask the indulgence of the Court when we refer to other cases. It seems to us clear that if the mere size of the business, or the effort to get a large part, or even all the business in any particular line, is not inconsistent with the statute, then the case for the Government (even if true in fact) necessarily fails, unless we are prepared to hold that if the means resorted to in order to acquire business are disapproved of by a jury as being unfair, or reprehensible, or not ethically sound, guilt, under the statute, results because of the use of these means, without regard to the question as to whether they had any reference at all to Congressional legislation of any character.

If the Government's theory in this case be sound, then a case would be stated, under the statute, if a trader, and its servants or officers, were charged in the general terms of the statute with a conspiracy to restrain trade, or a conspiracy to monopolize trade, and that this was to be effected under the conspiracy agreement by robbing a bank, so as to put the alleged conspirators in possession of the means necessary, or by burning the plant of a rival, or by his assassination, or by any other violation of a state statute. It would be sufficient to charge that the conspiracy contemplated the using of false weights, or short measures, or the doing of things of doubtful propriety concerning which juries might well disagree, some juries thinking that the business tactics were allowable, and, therefore, the statute had not been violated, and another jury that they were not allowable, and, therefore, in their judgment, the statute had been violated.

A number of cases can be cited to sustain our view—cases which are very much stronger than that embraced in the Government's theory in the case at bar.

A leading case, one frequently referred to by text writers and in other cases, and, so far as we can discover, never questioned before it seems to have been questioned by Judge Shep-

pard, is that *In Re Greene*, 52 Federal, 104. It is a decision by Mr. Circuit Judge Howell E. Jackson. On page 111 the Court says, citing decisions of the Supreme Court of the United States, "that crimes and offenses, cognizable under the authority of the United States, are such, and only such, as are expressly designated by law; and Congress must define these crimes, fix their punishment, and confer the jurisdiction to try them. * * * We regard it as well settled by the authorities that an indictment, following simply the language of the Act, would be wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly and clearly set forth all the elements necessary to constitute the offense intended to be punished." (The Court cites *United States vs. Cruikshank*, 92 U. S., 542; *United States vs. Simmonds*, 96 U. S., 360; *United States vs. Carll*, 105 U. S., 611; *United States vs. Britton*, 107 U. S., 655, and *United States vs. Trumbull*, 46 Fed. Rep., 755, all of which will be found in point.)

"Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several States, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination,' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment." At the end of page 112 the Court continues: "But Congress certainly has not the power or authority under the commerce clause, or any other provision of the constitution, to limit and restrict the right of corporations created by the States, or

the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit." On pages 114 and 115 the Court deals with the means set forth in the indictment to show the purpose to monopolize—means very much stronger, and more indicative of guilt under the Government's theory, than any of the means mentioned in the case at bar—and then, on page 115, says: "It is not very clear what Congress meant by the second section of the Act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the States or with foreign nations. It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners. **All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect**

powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns. A "monopoly" in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone (4 Bl. Comm., 159) and by Lord Coke (3 Co. Inst., 181), it is a grant from the sovereign power of the state by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the Act was under consideration in the Senate, distinguished members of its Judiciary Committee and lawyers of great ability explained what they understood the term 'monopoly' to mean, one of them saying: 'It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.' Another Senator defined the term in the language of Webster's Dictionary: 'To engross or obtain, by any means, the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade.' It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or com-

merce among the States must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein. It was certainly not a 'monopoly,' in the legal sense of the term, for the accused, or the Distilling & Cattle Feeding Company, to own seventy distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused, or said Distilling & Cattle Feeding Company, to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. **The effort to control the production and manufacture of distillery products, by the enlargement and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration."**

The case of *Whitwell vs. Continental Tobacco Company*, 125 Federal, 454, a decision by the Circuit Court of Appeals for the 8th Circuit, is in point and is instructive. It holds: "If its **necessary** effect is to stifle, or to **directly and substantially** restrict, free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law. * * * If, on the other hand, it promotes or but incidentally or indirectly restrict competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and

operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this Act, and it is not subject to its denunciation." And after a discussion of the facts of the case before the Court, on page 462 it continues as follows: "It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by Section 2 of the Act of July 2, 1890? If so, no interstate commerce has ever been lawfully conducted since that Act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. **An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies.** Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the States, and some single corporation or person must be permitted to receive and control it all in one huge monopoly."

In the case cited, the Court, through Circuit Judge Sanborn, affirmed the Judge of the Court below, dismissing the complaint, although the case concerned interstate commerce, and it was alleged, among other things, that "a manufacturer, a corporation and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but

refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again."

If a petition on the civil side of the Court that charged more than the mere purpose to do the things mentioned, but the actual doing of them to the damage of the party complaining was demurrable, certainly an indictment which merely charges a purpose to do very much less cannot be sustained.

If there is no law against a trader, either a corporation or a natural person doing all the business it can, then success in business, even to the extent of a practical monopoly, cannot be obnoxious to any statute under any legislation that stops short of the socialistic.

This being so, we insist that an indictment framed or a case built up upon the theory that the trader did not use fair means, or "play the game fairly," would not be sustainable under the law. As already suggested, such a contention would lead to illogical and remarkable consequences. After a while the question as to whether a trader uses, ethically, correct means in his effort to acquire business becomes a very close one, and equally intelligent and conscientious juries would differ in its solution, and every man would do business subject to the indeterminate and indeterminate notions of juries. If we are right that mere size of business does not affect the matter, and the Government is right in the position that if reprehensible means are used, these means may involve a violation of the law, then a judge would charge the jury to convict or acquit in any particular case according to their opinion as to the propriety of the means used. This would lead to "confusion worst confounded," and no trader would be safe from fine and imprisonment, and might easily be made the victim of a con-

spiracy by rivals, or to the prejudices of a weak and unintelligent jury, too ready to strike men supposed to be possessed of large means.

The observations and authorities submitted apply not only to the indictment, but also to the case under the evidence. The indictment, as is usually the case, states a very much stronger case than does the evidence. Indeed, we shall insist that even if the indictment be sound, no case in any event was made out against any Defendant under the evidence.

(3) A fatal objection to the indictment is that no conspiracy is stated, or can be, in view of the facts.

This point has been largely anticipated. The authorities already cited bear upon the proposition that there must be a combination of some kind between traders.

There is no conspiracy in the case made. As said by the Court in *Pettibone vs. United States*, 148 U. S., 203, a conspiracy is "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means." The conspiracy charged is one to restrain trade, or to monopolize trade. Neither one of the corporate Defendants is made a party to the conspiracy except through representative officers, and they are not connected with it except as officers. The American Naval Stores Company is, under the theory of the indictment, made a party through the six individual Defendants, five of whom are alleged to be principal officers and one an agent and employee in charge of its Jacksonville place of business. Three of these same representatives are also alleged to be representatives of the other corporate Defendant. **We have then the remarkable insistence that corporations can conspire through officers (as they must, if they conspire at all),**

and, at the same time, conspire with these same officers. If the American can be charged with forming a conspiracy through its officers, and, at the same time, with these same officers, then it could be so charged if there were only one officer, and a case would be stated if it was charged that the American entered into a conspiracy through its President, Mr. Nash, and, at the same time, with its President, Mr. Nash. The case is not helped for the Government by the fact that there is another corporation included in the indictment because this corporation is not a trader, and the representatives through whom it is proposed to connect it with the conspiracy are three of the representatives through whom the American is connected. If the indictment be good, then it would be equally good to say that both corporations conspired through Mr. Nash and, at the same time, conspired with him. Of all offenses, conspiracy involves mental operations, planning, scheming—of all offenses it requires mind and purpose, and you cannot say that a corporation used this mind and this purpose of an individual and, at the same time, conspired with the same individual. It is tantamount to saying that an individual conspired with himself. It may be that a corporation can be guilty of conspiracy and the officer through which it conspires be also guilty, but in a case of this kind you must bring in corporations not represented by these officers, or independent persons of some kind. If the two corporations mentioned in the indictment are distinct and separate corporations, they might be guilty of the offense, if they acted through their own independent officers, and those officers might also be guilty, but we do see how they can be guilty of a conspiracy when the human minds used are those of certain common officers, and, at the same time, these officers be also guilty. If we are wrong, then the result is that two corporations can conspire through the one mind of a common officer and all three be guilty of conspiracy. In the case at bar it cannot be said that the two corporations are in any sense competitors. The fact is that one of them is

not connected with trade in any way, but is only a warehouse and terminal company, and the evidence develops the fact that the American owns all of its stock. The remarks of the Court in *Whitwell vs. Continental Tobacco Company*, 125 Federal, 460, a case already quoted therefrom, are apposite in this connection when the Court says: "The two defendants in this case have never been, and never intended to be, competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company." Just before this, the Court notices that "the tobacco company is a manufacturer and trader and McHie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors."

While we do not think it is well decided, the case of *Tribblett vs. United States*, reported in 95 Pacific, page 85, is, under its facts, not against us. So far as we can discover, however, it is the only case of any Appellate Court which has sustained a conviction under the penal provisions of this statute. It appears that in that case two individuals and one corporation were indicted. One of these individuals, who testified in behalf of the United States, was given immunity and the indictment against him, upon motion of the Government, was dismissed. The Court instructed the jury to find the corporation not guilty, and the jury convicted one of the individual defendants. The case stated, and apparently proven, was that prior to the first day of August, 1906, certain

parties, two of the defendants among them, were engaged in the business of slaughtering beef, etc., and selling fresh meats, in active competition, and that thereafter, on the 23rd of August, 1906, these defendants entered into a combination, the two individuals obtained control and possession of the competing corporation and discontinued its business, and, in further pursuance of the combination and conspiracy, organized the defendant corporation and transferred to it the business theretofore conducted by each of the parties, received in exchange the capital stock of the corporation; that they became its officers and directors, and as such conducted its affairs; that the defendants, in furtherance of the conspiracy, purchased the business of another party and caused it to be transferred, the seller agreeing not to compete with them, and having gotten rid of competition they increased the price of meat, and arbitrarily fixed it at a high price. The idea seems to have been that the defendants determined to get a monopoly and raise the price, and adopted the tactics set forth in the indictment in order to accomplish this purpose. Nothing of this kind is charged, or intimated, in the present indictment. No attack of any kind is made upon the formation of the American. It is a bald case of one trader, trading in its own name, and for its own benefit, through its officers and representatives, charged with crime upon the idea that the tactics used were not fair.

It may be noted, in passing, that the result sustained by the Arizona Court is remarkable. The indictment charged only three defendants with a conspiracy among themselves. It was not alleged even that they conspired "with divers other parties to the prosecution unknown," and yet a conviction against a single defendant is sustained. Under all the authorities, it is not legally possible for one person, either a natural person or an artificial person, to be guilty of conspiracy. The offense requires at least two. (Wharton's *Crim. Pleading and Practice*, pages 305, 756; *Pettibone vs. U. S.*, 148 U. S., 203.) However, whether this case is sound or not, under its facts, it does not hurt our contention.

Unlike the *Tribolet* case, it is not alleged in the case at bar that the Defendants convicted formed a corporation, or used one, in order to violate the law, or that they caused the corporation to do anything. It is not alleged (we repeat) that they were interested in the corporation as stockholders, or otherwise, than as officers.

By reference to page 44 of the Record, the latter part, it will appear that Judge Sheppard instructed the jury that "while one corporation cannot conspire with its own officers, directors, or agents, it may conspire with another corporation or with the officers, directors and agents of another corporation." The trouble with the Government's case and this charge is that this other corporation mentioned in the indictment had the same three officers, and was not in trade. Under the definition of conspiracy, already quoted, a conspiracy involves, necessarily, not only a combination, but a combination by at least two persons, and, in a case like the one at bar, a combination by at least two persons, by **concerted action**, to accomplish a criminal or unlawful purpose, the purpose here alleged being one to restrain trade and to monopolize trade. The words "combination" and "concerted" are strong words. In their etymology and definition, they include the ideas of deliberation, of planning, of meeting together.

(4) **Another objection to the Indictment, and to the case claimed by the Government is that it is not alleged or shown that the individual Defendants were traders.**

This defect is emphasized by the fact that only these five individuals were convicted.

We do not lose sight of the case of *Loewe vs. Lawlor*, reported in 208 United States, 274, commonly known as the *Hatters case*. It was a suit for damages and the Supreme Court held that the petition stated a case. This petition involved an extensive conspiracy, on the part of members of a labor union, to destroy the interstate business of the plaintiff. **The parties defendant, however, were not charged with the doing of what the petition alleged as agents or representatives of others, but doing it themselves and individually.** In the case at bar, the parties convicted are charged with acting as the representatives of a corporation although under the verdict, it cannot be said that the corporation itself did it at all.

It is as if A and B were charged with assault and battery—A with the actual striking and B as being present and urging him to strike—and it is found that A did not do any striking and yet B is guilty of causing him to do it.

This somewhat anticipates another branch of the argument.

The case of *United States vs. Patterson*, 55 Federal, 605, was used by the Government in the Court below.

We do not see how this case hurts us. In some respects it is helpful to our contention. By reference to the statement of facts, it will appear that the indictment contained 18 counts, and 14 of these 18 were held to be bad.

Although this point is not now germane, yet, as we have before us the case, we beg to observe that it is not authority to sustain the vague, general, indictment in the present case. The counts sustained are not set forth in the statement of facts on page 306. It is alleged that, according to the fourth count, the conspiracy was to be attained by preventing others from carrying on business by means of harrassing and intimidating competitors. But this is merely a statement as to the substance and effect of the count. It does not undertake to give its words.

The language of Mr. Circuit Judge Putnam, as already noticed, helps us, and although we may somewhat anticipate we quote therefrom. On page 638, he says: "This statute is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract or combination in restraint of trade may be not only not illegal, but praiseworthy as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set out to enable the Court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it. I regard the rule laid down by the Supreme Court in *U. S. vs. Hess*, 124 U. S., 483, as applying to this case; and I think the case of *U. S. vs. Simmonds*, 96 U. S., 360, is easily distinguished. If it is not, the later case will, of course, control. In reference to the suggestion of the counsel for the United States, as to cases at common law alleging conspiracy to prevent a man from pursuing his trade, it is sufficient to say that to conspire to prevent a man from pursuing a trade which he is entitled to pursue, is in itself illegal. But the case at bar is not at common law, and the proceedings under this statute are peculiar to the statute. I think the rules laid down in *United States vs. Hess* distinguished this indictment on this point from all the cases and principles of law relied on by the United States. The allegations of what was done in pursuance of the alleged conspiracy are, under this particular statute, irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail. I think it was so conceded at the argument. If not, there is no question about the law."

It will be observed that Judge Putnam was holding that the bulk of the counts were bad because there was not a sufficient statement as to the conspiracy, and, in this connection, held that the allegations of what was done could not be laid hold of to enlarge the necessary allegations of the indictment as to the conspiracy.

On pages 640 and 641 Judge Putnam analyzes the statute and on the latter page says: "It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise." (The words "certain competitors" suggest that the names must have been given and help to explain the general description of the counts on page 606.) We shall insist that the indictment in the case at bar does not stand the tests of a good indictment as laid down in *United States vs. Hes*, a case which Judge Putnam applies to this statute.

(5) There are other substantial objections to the indictment. Those already made go to the vitals of the case and are in support of the contention that, under the facts, no valid indictment can be framed. If we are wrong as to this, we would still insist that the indictment is bad because too vague and indefinite.

Judge Sheppard recognized this, in that he required a bill of particulars which would amplify in a number of important respects. While a bill of particulars does not help a bad indictment, or save it from a demurrer, and the Government is confined to its allegations after it is furnished (*Joyce on Indictments*, Section 287; *State vs. Van Pelt*, 136 N. C., 633, 68 L. R. A., 760; *U. S. vs. Adams Ex. Co.*, 119 F., 240), and while, under the Constitution, an indictment is not amenable, the Judge properly recognized that it would not be fair to Defendants to force them to a trial without requiring the bill of particulars.

In *United States vs. Hess*, 124 U. S., 486, the Court, in dealing with an indictment much more specific than the one in the case at bar, says on page 486: "The general and, with few exceptions, of which the present is not one, the universal rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital." On the next page the Court says: "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description, with which he is charged." The Court then repeats the proposition laid down in *United States vs. Cruikshank* in these words: "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state species; it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For those facts are to be stated, not conclusions of law. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." In the conclusion of the opinion the Court says: "Following this rule, it must be held that the second count of the indictment before us does not sufficiently describe an offense within the statute.

The essential requirements, indeed all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict."

It will be noticed that in *United States vs. Hess*, a motion was made, after verdict, in arrest of judgment, and the Court held that the objection to the indictment was good in such a motion. Under this decision, a general demurrer in the case at bar would have sufficed.

The specifications are utterly vague and general. If they had been alleged as overt acts, surely the indictment would have been plainly and palpably demurrable. The fact that they are alleged as a part of an agreement ought not to make the indictment any the less so. When an agreement is declared on, it must be set forth with fullness and particularity. "When a written instrument forms part of the gist of the offense charged, as in a case of forgery, libel, threatening letters, etc., it must be set out in the indictment according to its tenor or verbatim. The rule is changed by statute in some jurisdictions." "When a written instrument must be mentioned or described in describing the offense, but is not of the gist of the offense, its substance or purport only need be given." (Clark's Criminal Procedure, page 205.) In the case at bar, the substance or purport is not given. We insist that if the indictment alleged that the Defendants entered into a written agreement, or conspiracy, to restrain trade or to monopolize trade by the means mentioned in the indictment, then the means would be a necessary part of the agreement and ought to be set forth with particularity. Such an indictment would be clearly demurrable if as vague as the one at bar. The fact that the agreement may be a verbal one makes the principle none the less applicable. This indictment proposes to try Defendants under a charge that they make an unlawful agreement, called a conspiracy agreement. The charge is that they "combined, conspired, confederated and agreed together to restrain trade," etc., the same charge being repeated in the

next count touching the conspiracy to monopolize trade. The agreement ought to be set out. How utterly vague the specifications are will be seen by reference to pages 3 and 4 of the Record. Take, by way of example only, the charges as to circulating and publishing false statements, as to issuing and causing to be circulated and hypothecated fraudulent warehouse receipts, and attempting to bribe employees of competitors. No man, under any system of laws tolerable in a free country, would be required to go to trial under such charges. The fact that no evidence was offered to sustain them is not material when we deal with the question as to whether the Court below was right in overruling the demurrer.

Other specifications are equally vague and objectionable. If duress, oppression, etc., were properly charged, they would not involve any violation of the law. In *Re Green*, 52 Federal, 114; *United States vs. Patterson*, 55 Federal, 641; *American Banana Co. vs United States*, 160 Federal, 184 (6), 189.

Charges like false grading, if they involved a violation of a State law, cannot be considered even if they are fully and properly stated. In *United States vs. Cruikshank*, 92 U. S., 55, bottom of page, it is said: "It is no more the duty, or within the power, of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself."

In connection with the indictment and this general contention, we refer to *Rice vs. Standard Oil Company*, 134 Federal, 469 and 470. (This case deals with several of the specifications in the case at bar.) *U. S. vs. Carll*, 105 U. S., 612, 613; *Armour Packing Company vs. United States*, 153 Federal, 16 and 17; *U. S. vs. Greene*, 136 Federal, 643.

**THE VERDICT RENDERED IS ILLEGAL AND THE
MOTION IN ARREST OF JUDGMENT SHOULD
HAVE BEEN SUSTAINED.**

In logical sequence, we, perhaps, ought to notice at this point of the brief the assignments of error bearing upon the admission of testimony, the overruling of the motion to direct a verdict, and the charge to the Jury, but, with the permission of the Court, we will notice the objections to the form of the verdict. They are made by the motion in arrest of judgment, to be found on pages 33 and 34 of the Record, and also by the last assignment of error, to be found on page 48 of the Record.

By reference to page 66, it will appear that the bill of exceptions states as follows: "That the jury impaneled in the said case, after they had been in the jury room considering their verdict for two hours and a half, returned into Court with their verdict finding the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, guilty on the first and second counts of the indictment; finding the defendant C. J. DeLoach not guilty, and making no return as to the two corporate defendants, and no allusion as to these two corporate defendants. The jury was not interrogated as to these corporate defendants, or either of them, and the verdict was received and the jury discharged. The instructions of the Court to the jury covered these two corporate defendants as completely as it did the individual defendants."

The record will show, indisputably, that the chief defendant was the American Naval Stores Company, the only trader in the case. If this Company and all reference to it could be stricken from the Record, there would be nothing left in the case—hardly a shell—it would be worse than the play of Hamlet with Hamlet left out. This Company gave the name to the case. In all the pleadings and proceedings, the case sounds United States of America vs. the American Naval Stores

Company, et al. If there was any restraint of trade or conspiracy to restrain trade, it was by the American Naval Stores Company and in its interest. If there was any monopolizing, the monopolizer was this Company. Whatever the convicted defendants did, they did not for themselves, but for this Company and as its representatives. They are not in trade themselves. They were not and could not be, under the facts, actual or potential competitors of the American or of any other Company.

While it is true that the American and the other corporate defendant cannot be tried again, the verdict being tantamount to an acquittal, it is a non sequitur to say, **in view of the Act of Congress**, that this is the sole effect of the verdict and that the convicted Defendants cannot object to the verdict as being illegal and not supporting a legal judgment.

In addition to this, we make the same point in the last assignment of error which reads as follows: "Because the said verdict is illegal in that it appears that these defendants are indicted as officers and representatives of the American Naval Stores Company, two of them being also representatives of the National Transportation and Terminal Company, and are charged with conspiracy to restrain trade and conspiracy to monopolize trade for and in behalf of the only trader mentioned in the indictment, and the only party alleged to be connected with trade of any kind, namely, the American Naval Stores Company, and these defendants cannot be found guilty with the corporations eliminated from the case and ignored by the verdict, particularly the American Naval Stores Company." (Page 48 of Record.) This ground is taken "against" the contingency that it may be contended that judgment could not be arrested because of what we submit is a defective verdict.

There is nothing to indicate that the jury considered at all the case as to these two corporate defendants, or that they made any effort of any kind to pass on their case. The verdict as rendered and the record are entirely consistent with the fact that the jury elected, arbitrarily, not to consider

the case as to these two defendants, not even that as to the only trader involved, although the case turned around this trader and was brought under legislation designed to punish abuses in trade. There was no mistrial declared as to either of these two defendants; there was no judicial ascertainment of the fact that the jury was unable to agree as to them; there is no finding at all which will illustrate the question as to the right of the Court to subject these two defendants to another jury trial.

Under all authority, a verdict must be responsive to the issues involved, or it will be incomplete and will not support a valid judgment. There were issues involved as to both of these defendants, particularly the American Naval Stores Company, as to which the verdict makes no response, and, so far as the Record shows, as to which the jury made no effort to make response, and, therefore, the verdict rendered is an incomplete and an illegal verdict, and the jury has been discharged without the performance of the duty resting upon them.

If the jury could have ignored two defendants, then it could have ignored six of the eight and (but for the principle that one person cannot be guilty of a conspiracy) they could have ignored seven of the eight. If the course pursued by this jury be legal, and the verdict be legal, then it would also be legal in an ordinary case where there were fifty or more defendants, if the jury elected to consider the case only as to one, and made no finding, or report of any sort, as to all the others. Indeed, if a jury can arbitrarily ignore two of the defendants, particularly the principal defendant, then it might ignore all and come into Court and make a finding reading somewhat like this: "We the jury have been charged to pass upon this case as to all of the defendants, but we have elected not to consider the case as to any of them, and make this return to the Court, and respectfully take our leave of the Court. We regard this as a sufficient performance of our duty, and a sufficient compliance with the instructions of the Court."

We submit that the contention is settled in our favor by the Congressional legislation on this subject, reasonably and

fairly interpreted. We do not know of any legislation in any State that deals with this specific matter. Decisions in State Courts, if any can be found, doubtless deal with the subject in the light of general principles; but the United States Courts, are bound by an Act of Congress, **which Act we invoke.**

It is the Act of June 1, 1872, to be found in 17, Statutes at Large, page 196, and in Sec. 1036 of the Revised Statutes. The title of the Act is "An Act to Further the Administration of Justice." Section 10 of the Act is now embodied in Sec. 1036 of the Revised Statutes. It reads as follows: "On an indictment against several, **if the jury cannot agree upon a verdict as to all**, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered **accordingly**; and the cause as to the other defendants may be tried by another jury." Obviously, this law requires, in order to make the finding complete, a return to the Court as to an inability to agree as to all, if it so be that a jury cannot agree. **The condition precedent under which the jury may render a partial verdict is that they cannot agree upon a verdict as to all.** In this event, and in this event only, "they may render a verdict as to those in regard to whom they do agree." The language is "if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree." Under the dictionaries and the judicial expositions, the word "if" is expressive of a condition. The limitation of their authority to render a partial verdict is expressed in the words "if the jury cannot agree upon a verdict as to all." Without doing the slightest violence to the obvious meaning of the words, we can transpose the words and let the section read as follows: "On an indictment against several, the jury may render" (is authorized to render) "a verdict as to those in regard to whom they do agree if the jury" (that is to say, provided the jury) "cannot agree upon a verdict as to all but not otherwise." The words used necessarily mean that they must make an honest effort to agree as to all, **and that this**

fact must be judicially ascertained and judicially noted, as in the case of any other mistrial because mistrial it is as to the Defendants concerning whom they are unable to agree.

The words "on which a judgment **shall be entered accordingly**" are significant. The adverb "accordingly" is defined by the dictionaries as "agreeably, correspondingly, suitably,—in a manner conformable." They necessarily require the conclusion that the Court must render a judgment, in the case of a partial verdict, finding that the jury were unable to agree as to one or more of the defendants, but did render a verdict as to others. A "judgment shall be entered accordingly," that is to say, conformably to the finding contemplated. We respectfully urge that the judgment contemplated by the words "on which a judgment shall be entered accordingly" has not been rendered in this case. Under the words used, a finding of an inability to agree as to one or more is as completely required as a finding of guilty or not guilty as to others, and the judgment that is to be "accordingly" rendered demands both features in the finding.

The concluding words "and the cause as to the other defendants may be tried by another jury" also clearly indicate that there must be a finding as to the defendants concerning whom the jury are unable to agree. If the jury had done what their duty and the instructions of the trial Court required, namely, passed upon the case as to all of the defendants, and had reported as to the two corporate defendants that they were unable to agree as to them, then, and then only, would the Judge have been authorized to have received the verdict and discharge the jury, and, in this event, the corporate defendants could have been again tried. The Government may admit that the verdict, being silent as to them, they cannot be again tried, but who can say what would be the result had the jury complied with the law?

The words "on which a judgment shall be entered accordingly" being mandatory, requires some kind of judgment, and the preceding language means as to a verdict rendered in accordance with the law. Under the facts, the Court could

not render a judgment to the effect that the jury were unable to agree as to the two corporate defendants. The Court was not advised as to this at all. The Court could not say, even if this were consistent with the law, that the jury elected not to consider the case at all as to these two defendants, and to eliminate them. Who can say? The only judgment rendered were sentences upon the convicted defendants, but is this the judgment contemplated by the words "on which a judgment shall be entered accordingly?" These words must be read in the light of their context, and they mean, if they mean anything, that it must appear by the judgment, in the light of the fact that the jury impaneled rendered only a partial verdict, that they were not able to agree upon a verdict as to the two corporate defendants. But this judgment could not be rendered without a formal report to this effect from the jury and the judicial ascertainment of the fact.

So far as we can discover, this section of the Revised Statutes has been before the Court only once. In *Bucklin vs. United States*, 159 U. S. 682, the point decided is that an instruction on the trial of several defendants indicted separately for offenses growing out of the same transaction (there were three cases which were consolidated and tried at the same time and by the same jury) to the effect that while the jury might find a verdict of guilty as to all the defendants, and find some guilty and some not guilty, they could not find a verdict as to some and **disagree** as to the others, contains a prejudicial error which may be taken advantage of by the defendant who is found guilty and convicted. Two of the three defendants were finally acquitted and Daniel H. Bucklin, at whose instance the point was sustained, was convicted. **This case is authority against the suggestion, should the Government make it, that it is no concern of the ^{five} two defendants, who were convicted, that the jury may not have considered the case at all as to the corporate defendants.** Our point is that every defendant is entitled to a legal trial, and, if convicted at all, to a conviction by a legal

verdict, and that, if this verdict is illegal, then no legal judgment can be pronounced upon it. On page 686 of the Bucklin case, the Court notices Sec. 1036 and the insistence of the Attorney General that this section is not in terms applicable to separate indictments tried together, but the Court, nevertheless, does apply it. We invoke, however, the language of the Court, and claim that it sustains our contention as to the incompleteness and unlawfulness of the verdict in the case at bar. On page 686 the Court says: "Taking the record as disclosing all that occurred at the time the jury came into Court for additional instructions" (the Court was evidently of opinion that the Record must show what occurred and that it ought not to indulge in presumptions against a defendant) "there was error in the ruling that the jury could not find a verdict as to some of the defendants and **disagree as to the others.** The jurors had been deliberating for three days without returning a verdict as to either of the defendants when they were instructed that their duty was either to find each defendant not guilty, or each guilty, or some guilty and the others not guilty. If some of the jurors wavered in their minds as to the guilt of all the defendants—and the delay in returning a verdict justifies the belief that such was the fact,—**it may be that the instruction of which complaint is made worked injury to the plaintiff in error. We cannot say that it did not.** To say that the Court would not receive from the jury a report of a disagreement as to one defendant was in effect to announce that the jurors would be held together until the Court should deem it to be its duty to discharge them finally, and would not be discharged unless or until they returned a verdict of guilty or not guilty. This tended to coerce the jury into making a verdict. **The accused was entitled of right to go before a new jury if the one that tried him was unable to agree that he was guilty of the offense charged.** As it was competent for the jury to return a verdict of guilty or not guilty as to the defendants Thomas Bucklin and George Elder, and to report a disagreement as to Daniel A. Bucklin, the instruction complained of must be

held to have been erroneous, and as this error **may** have injuriously affected the rights of the accused, the judgment is reversed with directions to grant him a new trial."

In the Bucklin case it will be noticed that the verdict as rendered was a complete verdict in form, and not subject to a motion in arrest of judgment. The verdict rendered was "a verdict of guilty as to Daniel A. Bucklin and not guilty as to each of the other defendants." (Latter part of page 684). The fact upon which a new trial was granted was necessarily one aliunde to the Record. The Court, however, evidently thought it necessary that the jury **report a disagreement** as to a party concerning whom they were unable to agree, so that this fact could be judicially ascertained and made a matter of record and it could be then determined whether the case as to the defendants concerning whom a mistrial was made might be tried by another jury.

The Record shows, in the case at bar, that the jury deliberated two hours and thirty minutes before rendering a verdict, and then brought in the verdict set out on page 10 of the Record. Suppose the jury had been interrogated as to their failure to make any report as to the two corporate defendants, and had been instructed that it was their duty to make a report as to them, finding them guilty or not guilty, or reporting their inability to agree, and they had gone back into their jury room,—who can say what the result may have been? If averse to finding the American Naval Stores Company guilty for any reason, it might have occurred to them—it certainly ought to have occurred to them—that it would not be logical to convict officers and acquit this trader when the officers were brought into the case as officers, and when the conspiracy to restrain trade and to monopolize trade could be entered into only through these very officers and a different verdict may have the result. This Court granted Bucklin relief because the error may have injuriously affected the rights of the accused.

The observations of the Court in *Patterson vs. United States*, 2 Wheaton, 221, are with us, although it was an

action of debt upon a bond given to the United States and not a criminal case. We do not see any distinction in principle. The unanimous decision of the Court holds, touching defective verdicts: "The rule of law is precise upon this point. **A verdict is bad** if it varies from the issue in a substantial matter, **or if it finds only a part of that which is in issue.** The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the Court in which the cause is tried may give form to a general finding so as to make it harmonize with the issue, yet, if it appears to that Court, or to the Appellate Court, that the finding is different from the issue, **or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.** (Italics always ours unless otherwise stated.) In the case of *Garland vs. Davis*, 4 Howard, 131, it appears that the opinion just quoted, and in the words quoted, was reviewed and unanimously reaffirmed. See also *Downey vs. Hicks*, 14, How, 246.

We submit that in the case at bar a large part of the issue is ignored and the verdict rendered is confined to a part only of the issue. The most important issue in the case was as to the guilt of the American Naval Stores Company, and there was another issue, although comparatively a minor one, as to the guilt of the other corporate defendant, and these issues have not been passed upon and the law which permitted the reception of a partial verdict and the discharge of the jury, has not been complied with, and this verdict is rendered contrary to the statute.

If this be a legal verdict in the case at bar, then the statute would have to be construed just as if it read "on an indictment against several, if the jury cannot agree upon a verdict as to all, **or elect not to consider the case as to one or more defendants,** they may render such partial verdict as they see fit to render, and a judgment shall be entered accordingly and the cause as to the defendants concerning whom the jury

report a disagreement, or as to whom they elect not to consider the case, may be tried by another jury."

A leading case in Georgia, one referred to with approval in subsequent Georgia cases, is that of *Woods vs. McGuire's Children*, reported in 17 Ga. 361, and to be found also in 63 Am. Dec. 246. The decision does not turn upon the mere form of the action. There is no suggestion of this kind in later Georgia cases, some of them rendered after the adoption of the Code, and which refer to this case with approval. It appears that the Supreme Court of Georgia has always understood the case to hold just what we claim it does hold.

The later cases in 76 and 78 Ga. which follow it are not ejectment cases. The form of action was the short complaint for land, commonly known as "Jack Jones Form," which simply recites that the defendant is in possession of a tract of land, describing it, to which petitioner claims title; that he has received the profits of the land (if profits are claimed) from the time mentioned and the value mentioned, and refuses to deliver the land to petitioner or to pay him the profits, and then follows a prayer for process and the attaching of an abstract of title. (Code of Ga. of 1882, sections 3389, 3401.) There were five plaintiffs, one of them being Lovick McGuire. As stated by the Court, (17 Georgia, 362), "it was admitted and the proof showed that he had conveyed his interest to the defendants. The Court charged the jury they were bound to find against him." The jury returned a verdict in favor of the other four plaintiffs by name, and for four-fifths of the premises in dispute, Lovick McGuire having, as noticed, conveyed his one-fifth to the defendants. The verdict, therefore, gave the plaintiffs all that they were entitled to and obeyed the instruction of the Court to the extent that it gave Lovick McGuire nothing. After noticing the charge, the Court nevertheless holds "they were certainly bound to find either for or against him and failing to do either, the verdict and judgment are imperfect and should have been vacated. The general rule undoubtedly is, that the verdict must comprehend the whole

issue or issues submitted to the jury in the particular cause; otherwise the judgment founded on it should be reversed." (The Court refers ~~as~~ sustaining this proposition to *Patterson vs. United States*, just quoted from by us, evidently thinking that the principle of the case covered the failure of a verdict to find for or against a party.) After recognizing the proposition that a Court could sometimes "work a verdict into form" and make it serve, the Court says: "But the difficulty here is, not that the jury have expressed their meaning in an informal manner, **but they have failed to express any opinion at all as to one of the parties.** True, they have not found for Lovick McGuire; but are we authorized to say, that they intended to find against him. How shall the verdict be amended then? For this plaintiff, or for the defendants, as to him? The verdict gives no response to this question and the Court is not at liberty to answer for the jury. *Petrie vs. Haney*, 3 D. & E., 659, and *Richardson vs. Melish*, 3 Bingham, 334, are authorities for amending informal verdicts. But here there is nothing whereby an amendment can be made.

"Under Jones' Form, under which this complaint was filed, it may become important that even in ejectments the verdict and judgment should be commensurate with the issue, but, as already stated, they should be so in all cases independent of the Act of 1847." To prevent any misconception of the scope of the decision, we beg to add that the Act of 1847 does not refer to the form of verdict, and the decision is not based upon any legislation in Georgia. The Act of 1847 is "An Act to simplify and curtail pleadings at law." It is set forth in Cobb's Digest, 490, et seq., and simply gives what we call the "Jack Jones Forms" of pleading, embodied in all the Codes except the last. The last words from the decision just quoted, instead of giving color to the suggestion that the decision may have turned upon the fact that the action was one in ejectment, is to the contrary of this. It may have been contended that, because this was an action in ejectment, the verdict was sufficient, but the Court was careful to say that "under Jones' Forms, under which this complaint was filed, it may become import-

ant that even in ejectments the verdict and judgment should be commensurate with the issue."

This decision has been referred to by the Supreme Court of Georgia more than once with approval. So far as we can discover, it has never been questioned by the Georgia Court, or any other. In *Shelton vs. O'Brien*, 76 Georgia, 821, the Court quotes from *Wood vs. Molly McGuire's children*, and approves it, and after stating the decision, says: "Thus holding that to find neither for nor against one of the plaintiffs was a substantial omission, though it was admitted that the plaintiff left out had conveyed his one-fifth interest to the defendants and the Court had instructed the jury to find against him." The Court italicizes the words "it was admitted" and the words "the Court instructed the jury to find against him."

The case at bar is much stronger. The Court did not eliminate either of these corporate defendants from the consideration of the jury. Even if the verdict had found as to all the defendants except DeLoach, concerning whom the Court instructed an acquittal, the case would still apply.

In *Wood vs. McGuire's Children*, "the defendants moved to set aside this verdict on the ground that it did not decide the issue as to one of the plaintiffs," and the motion was sustained by the Supreme Court, although it might have been suggested that no harm was done the defendants, in that the jury's verdict left with them the one-fifth interest conveyed to them by Lovick McGuire, and found for the other plaintiffs what they were entitled to. If such a reply was not regarded as a reply in this civil case, even under its facts, how much less is it a reply in the case at bar.

In *Mayo vs. Keaton*, Adm., 78 Georgia, 126, this case is again approved by the Supreme Court.

A similar principle is recognized by the Court in *Settle vs. Allison*, 8 Georgia, 201 (point 7), 208. See also to the same effect *Wicker vs. Woods & Co.*, 55 Georgia, 649.

The case of *Schweickhardt vs. City of St. Louis*, 2 Mo. Appeal, 571 and 583, is in point, citing, on the latter page, *Wood vs. Maguire Children*, in 17 Georgia, and *Patterson vs. United States*, in 2 Wheaton.

The case of *Com. vs. Wood*, 12 Mass., 313, is a decision at nisi prius, but it is with us, the Court holding if a jury **could not agree** as to one defendant, **and so reported**, the Court was at liberty to receive the verdict and permit a disagreement as to the other. It was a case of discharging a jury from necessity.

In *Com. vs. Cook*, 6 Serg. & Rawle, 577, reported also in 9 American decisions, 465, the decision is thus correctly stated in the head-note on page 465 of 9 American Decisions: "Where the jury agree as to one or more of several defendants jointly indicted, but cannot agree as to the rest, and are discharged from necessity, their verdict, so far as agreed on, must be received." Attention is invited to the observations of the Court on page 469, reviewing and following *Com. vs. Wood*, concerning which the Pennsylvania Court says: "Two were indicted for larceny; the jury acquitted one and was discharged as to the other **because they could not agree.**" By reference to *Com. vs. Wood*, 12 Mass., 313, it will appear that the jury came into Court and **reported** that they had agreed as to one of the Defendants "**but could not agree as to the other;**" that "the Attorney General objected to receiving a verdict unless on the whole matter committed to them, but the Court ordered the jury to be inquired of as to the Defendants severally and they answered that they found Wood not guilty but could not agree as to Sherman, and added that they had no prospect of agreeing. The Court **thereupon** discharged them of the indictment and ordered Wood to go without day and the indictment continued as to Sherman, who recognized for his appearance at the next term."

In *Kilbourne vs. Waterhouse*, Kirby Reports (Conn.), 424, it is held: "In an action for trespass against a number of defendants, who severally pleaded not guilty, the jury found a verdict for the plaintiff, omitting to mention two of the defendants, and on motion the Court set the verdict aside as not comporting with the issue."

In Proffatt on Jury Trials, section 333, the author says: "So where the jury have agreed as to one or more of several prisoners, their verdict as to them ought to be received, **though they cannot agree as to the rest, and are from necessity discharged by the Court.**" The author cites Com. vs. Cook, and Com. vs. Wood. In section 411 he says: "The great end and aim of all efforts in empannelling a jury and in the trial of the issue is to secure the verdict of a jury on the matter in controversy" and he then defines a verdict, as does Bouvier in his law dictionary (2 Bouvier, Title Verdict), as follows: "The unanimous decision made by a jury and returned to the Court on the matters lawfully submitted to them in the course of a trial of a cause." If this be a true definition of a verdict, then the one rendered is incomplete—palpably so.

See also to the same effect 1 Chitty's Criminal Law (fifth amendment from second London Ed.), page 640 and notes.

We do not think any case can be found, certainly no well-considered case, which is contrary to our contention on this motion in arrest of judgment. If one can be found, we submit it could not be followed in view of the section of the Revised Statutes, the meaning of this section and the observations of the Supreme Court of the United States, already quoted.

These observations, particularly those in 156 United States, and the case in 17 Ga., are in point on the proposition that Defendants are not obliged to show that the failure of the jury to comply with the law did them any hurt. We cannot say as to whether it did or did not. If the jury had been interrogated as to their failure to refer to the two corporate Defendants, and it had been ascertained, as may have been the case, that they had elected not to consider them at all, and they had been sent back and instructed to comply with the instructions of the Court already given, disagreement might have resulted, which would have prevented an agreement as to one or more of the five Defendants convicted, or an acquittal of one or more of the Defendants might have resulted. Who can say? Even in a civil case, on a question when it was claimed that an error was not prejudicial, it is held "that the fact that it worked no in-

jury must be made to appear beyond question." (Smiths vs. Schumaker, 17 Wall, 630), and in a recent criminal case the Court held "There is a presumption of harm caused by errors in regard to the admission or exclusion of evidence in a jury trial which requires the reversal of the judgment unless the Record clearly shows the absence of harm." (Crawford vs. United States, 212 U. S., 184.)

The case is very much stronger when we are dealing with a criminal case and the discharge of a jury before it has performed its functions.

Unless a defendant is lawfully convicted, his conviction ought not to stand. Otherwise we reduce a Court to a mere board of arbitration that does what it thinks proper regardless of rules. In a decision of this Court, it was compelled to so construe the law as to discharge a defendant, guilty, in the opinion of the Court of great wrongs, and richly deserving the blow of justice, but the Court found that it could not stretch the law to reach the case and it wisely observed that "only in the exact administration of the law will justice in the long run be done and the confidence of the public in such administration be maintained." (Clyatt vs. United States, 197 U. S., 222). In the case at bar, the law is invoked in behalf of Defendants against whom, we earnestly insist, there is no evidence whatever of guilt.

We contend that under the authorities where a verdict is defective, or the record does not justify a judgment, a motion in arrest of judgment is the proper remedy.

See 2 Ency. P. & P. 794 and 795.

First Archibald's Crim. Pleading, 341, 671, 672.

Wells vs. State, 116 Ga. 87 (2).

State vs. Grossman, 113 S. W. Rep. 1074 (5 & 6).

Patterson vs. U. S., 2 Wheaton, 225.

Should the Court hold, however, that this motion was not the proper remedy, we would, nevertheless, insist upon the contention already noticed, to be found on top page 48 of the Record, the last assignment of error, already quoted in this Brief.

As a matter of substantial justice and right, we submit, in addition to the legal view here presented, that a Court ought not to permit a judgment of conviction to stand against five officers of a corporation,—jail sentences being inflicted upon two of them,—when the theory of the Government's case, as shown by the Record, is that the American Naval Stores Company, the only trader mentioned, committed the offense through these very parties as its officers and representatives, and the effect of the verdict is in any event tantamount to an acquittal of this trader. The jury finds in effect that the theory of the Government's case is wrong, that the American Naval Stores Company did not commit the offense through these officers, or through anyone else, but, nevertheless, finds these officers guilty. It is exactly as if a principal and agent were jointly indicted and the prosecution claimed that the principal did the act through the agent, and yet the jury finds that the principal did not do the act at all, and, nevertheless, the agent is guilty of doing it for the principal. The finding of the jury, in the light of the Record, was illegal, illogical and contradictory.

The observations of the Mississippi Court in *Davis vs. the State*, 23 Sou. Rep. 770, sustain us in reason and in principle, although the facts are different from those in the case at bar. The point decided is that where two persons are jointly indicted for a single offense, and the only evidence is the testimony of one witness, which is in every detail identically the same against both, a verdict finding one guilty will be set aside where the jury disagrees as to the other. The principle is that if in the case at bar the evidence required the conviction of the American Naval Stores Company, **if the parties who were convicted were guilty**, and the jury, nevertheless, either acquitted the American Naval Stores Company, or disagreed as to the American Naval Stores Company, or failed to pass upon the case as to the American Naval Stores Company, the conviction had would be an illegal conviction.

MOTION TO DIRECT A VERDICT.

**The Motion to Direct a Verdict ought to have been sustained;
and for a number of reasons.**

This motion was made at the conclusion of the Government's case, and again at the conclusion of the entire testimony, and requests to charge were submitted, covering the contention that each Defendant was entitled to an instruction of a verdict in his favor. See assignments of error 2, 3, 4, 5, 6, et seq., pages 36 and 37 of the Record, and the statements in the Bill of Exceptions on pages 51, 52, et seq., of the Record.

Before discussing the evidence bearing on this general proposition, we beg the attention of the Court to some preliminary considerations:

(1) Conspiracy charges are not in harmony with the genius of a free government. The right to bring them is particularly liable to abuse and the danger of utilizing prosecutions of this character to advance the interests of competitors, or to gratify personal spleen, is particularly great.

In the case of the State vs. Van Pelt, 136 N. C., 633 (68 L. R. A., 760), already cited, the Court, through Judge Connor (a jurist of high reputation now on the Federal Bench), says concerning a conspiracy charge: "It would seem that as the defendant is entitled to demand the bill of particulars, and as the State on the trial is restricted to proofs of the facts set out, it would be more in accordance with good criminal pleading and the safety of the citizen to require the State to set out in the indictment the charge in full, together with the means by which the alleged conspiracy is to be effectuated. It is so held by many courts and required by statutes. No offense is so easily charged and so difficult to be met unless the defendants are fully informed of the facts upon which the State will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged.

General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written Constitution. We see no good reason why an exception to the general rules of criminal pleading should be made in favor of this crime. **Certainly there is nothing in the history of the criminal law of England or this country to recommend it to the favor of Courts having regard for liberty regulated by law. Such an indictment has been appropriately termed a 'drag net of vague charges' to catch innocent persons, who in times of excitement may be convicted by the suspicions and prejudices of juries."** The Court fully quotes, and with approval, from Dr. Wharton in his work on Criminal Law, and among other statements, the following: **"A distressing uncertainty will oppress the law if the mere act of concert in doing an indifferent act be held to make such act criminal. We all know what offenses are indictable, and, if we do not, the knowledge is readily obtained. Such offenses, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious and permanent. It is otherwise, however, when we come to speak of acts which, though not penal when they are committed by persons acting singly, are supposed to become so when brought about by concert which involves neither fraud nor force. * * * No man can know in advance whether any enterprise in which he may engage may not in this way become subject to prosecution. It is essential to the constitution of an indictable offense * * * that it should be prohibited either by statute or by common law; but conspiracies to commit by non-indictable means, non-indictable offenses, if we resolve them into elements, are neither prohibited by common law nor by statute. An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which, in one phase of judicial sentiment, would be regarded as a meritorious impetus to commercial activity, would be, in another phase of judicial sentiment, as it once has been,**

treated as an indictable offense. Legislative and judicial compromises which one Court may view as essential to the working of the political machine, another Court may hold to be indictable as a corrupt conspiracy."

(2). This prosecution is the result of business rivalries and animosities.

Instead of the parties responsible for the prosecution proceeding under the seventh section of the Anti-Trust Act, which permits threefold damages, the costs of suit, and reasonable attorneys' fees to any person injured in his business or property by any other person, by reason of anything forbidden or declared to be unlawful by the Act, if they really believed that the Act had been violated, the effort is made to injure a competitor in business through the potential aid of the Government and its processes.

Our insistence is that there is no real evidence of the conspiracy charged, but that there is abundant evidence of the existence of a conspiracy to destroy the American Naval Stores Company, and that this prosecution is a development of this conspiracy.

Without reference to other testimony, that of J. F. Martin on page 132 et seq. of the Record, and of W. F. Coachman on pages 148 et seq. will, we believe, demonstrate the correctness of this statement.

(3.) In passing upon the question as to whether a case has been made out, certain principles will be borne in mind. They apply also when the proposition already discussed is considered, namely, whether the indictment states a case under the statute.

In *United States vs. Brewer*, 139 U. S., already quoted from, the Court on page 288, says: "**Before a man can be punished, his case must be plainly and unmistakably within the statute.**"

In *Harrison vs. Vose*, 9 Howard, 376, the Court says: "In the construction of a penal statute it is well settled that all reasonable doubts concerning its meaning ought to be in favor of respondent."

See also *United States vs. Garretson*, 42 Fed., 25, and cases cited; *United States vs. Mathias*, 36 Fed., 895; *United States vs. Whittier*, 5 Dillon, 39 et seq. In the last named case, Judge Dillon says: "If there is any doubt whether the act charged by the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused."

In the *Schooner Enterprise*, 1st Payne, 34, Judge Livingston says (and this case is cited with approval by Judge Brewer in the *Day* case, 35 Fed., 876): "If it be the duty of the jury to acquit where such doubts exist concerning the fact, it is equally incumbent on a judge not to apply the law to a case where he labors under a similar uncertainty, as to the meaning of the Legislature."

As already noticed, the trial Judge in the case at Bar entertained the most serious doubts concerning the law in this case, and yet he seems to have resolved these doubts against the accused. In his opinion overruling the motion to direct a verdict (page 32 of the Record) he says: "Owing to the distressing uncertainty of the penal section, of the Act under which this prosecution is maintained, it is difficult to say what acts or conduct would come within the purview of the statute." And again: "Just what acts or conduct may amount to a violation of Section 1 and 2 of the Act, or what facts and circumstances would legally incur the penalties thereof may indeed be a doubtful legal problem."

(4.) The Bill of Particulars having been furnished, the Government is confined to it, and in a conspiracy case it is particularly important that the rule be rigidly applied that the *allegata* and *probata* must strictly correspond. *State vs. VanPelt*, 136 N. C., 633, to be found also in 68 L. R. A., 760, 763, et seq.; 8 Cyc., 671 and 672.

(5). **The Government is compelled to argue in a circle, when it contends that there is any evidence to sustain the verdict rendered.**

As already noticed, both counts are confined to an unlawful agreement, and, what may be termed the specifications, are a part of this agreement. The serious specifications (serious if true) smack of fraudulent practices, and suggest a violation of the State Statutes as to cheating and swindling. Upon their face, they have nothing to do with this Federal Legislation. The Government endeavored to show that certain employees of the American Naval Stores Company swindled and cheated customers by the false gauging of spirits of turpentine, and by fraudulently re-grading rosin without re-inspection. These charges would not suggest any violation of the Federal Statute, and to meet such a suggestion the Government says they are a violation because they were to be means used to restrain trade, or monopolize trade, within the meaning of the law. But when we say, as we do say, that there is no evidence of the conspiracy agreement, then the Government replies that the agreement is sufficiently manifested by the use of the fraudulent practices charged. In other words, the fraudulent practices are brought within the purview of the law upon the ground that they were a part of a conspiracy under the Statute, and the only evidence of this conspiracy is the doing of these fraudulent things. It is emphatically a case of arguing in a circle, and the more closely the Record is studied, the more clear will be the fact that there is really no evidence whatever to sustain the Government's case.

The special attention of the Court is called to the fact that the most serious charges in the two counts—those covered by the words in both counts, “by circulating and publishing false statements as to naval stores production and stocks in hands of producers and their immediate representatives, by using and causing to be circulated and hypothecated fraudulent warehouse receipts, and attempting to bribe employees of competitors, so as to obtain information as to competitors' business and stocks,” were abandoned by the prosecution, and for this rea-

son withdrawn by the trial Judge from the consideration of the jury.

There is not a line, or a word, in the Record to warrant these charges. They were well calculated—particularly that as to the circulation and hypothecation of fraudulent warehouse receipts—to injure the American Naval Stores Company in its business, and to cause alarm to the banks with which it did business. Naturally, the business world would at once know of these charges. The indictment was found on the 11th day of April, 1908 (page 10 of the Record). A trial was not obtained until a year thereafter. Then for the first time it appears that there was no warrant for these charges, but the mischief had been done.

(6). **The admission that no evidence had been offered to sustain these three specifications constrain, we submit, the direction of a verdict in favor of defendants.**

We admit that where a conspiracy is charged, and different overt acts are alleged, it is sufficient to prove any one overt act, if it was done in pursuance of the conspiracy. But in the case at bar no overt act is alleged. **An unlawful agreement is alleged, and the circulation and publishing of false statements, the circulation and hypothecation of fraudulent warehouse receipts, etc., are a part and parcel of the unlawful agreement.** Our contention is that the entire agreement has to be proven, as laid, and, if it is not, that the case fails.

In other words, this indictment stands substantially as if the Government had alleged that the defendants in the Court below entered into an unlawful agreement to do the twelve things specified in both grounds, and had failed to prove this agreement. Suppose it had been alleged that the agreement specified was in writing, and the writing produced showed an agreement to restrain trade, or to monopolize trade, by nine of the twelve means alleged; but that three means noticed were not in the agreement, and that therefore, it appeared that the agreement as proven was substantially

different from the agreement as alleged, in such a case, we submit, the case would fail.

Suppose an indictment were to allege that the defendants entered into a conspiracy to burn a dwelling, and agreed to employ A, B and C to set the dwelling on fire, and it appeared that the agreement was to employ A only, and not either B or C—we submit that the case would fail.

We do not see how there can be any difference in principle between a verbal agreement and a written agreement.

(7). But we insist that there is no evidence at all of the formation of any conspiracy agreement.

A scintilla of evidence—if there is a scintilla—will not answer in the United States Courts. As said in *Coughran vs. Bigelow*, 164 U. S. 307 (a civil case, and the observation ought to apply a fortiori to a criminal prosecution): “It has long been the doctrine of this Court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly.” See also *Commissioners vs. Clark*, 94 U. S. 284.

There is not a syllable of direct evidence of the agreement confederacy charged. Under the best authorities, the Court should have required a preliminary showing of the conspiracy agreement before permitting evidence of acts done. See *Hall vs. The State*, 12 Southern, 449; *Clark’s Criminal Procedure*, 542; *United States vs. Gooding*, 12 Wheaton, 469.

The Government may claim that there was direct evidence from Hoskins, a negro witness, whose testimony can be found on Page 115 of the Record. This witness admitted that he had been discharged by the National Transportation and Terminal Company, a party Defendant, the stock of which was

owned by the American. He claimed that he was discharged for fighting. The defense proved by two white witnesses that he was discharged because he attempted to collect the wages of a co-employee, on a forged order. (Pages 170 and 175).

The testimony of Hoskins was that Moller, the Manager of this Company, told him "you will have to be either against us or for us, and you have been employed by the American Naval Stores Company long enough to know that this Company will not stand for competition." (End of Page 115). Moller positively denies the statement, saying: "I did not tell him anything as to my Company or me not standing competition. I would not discuss such a subject with a negro." (Page 178). In view of the impeachment of Hoskins, and the inherent improbability of the statement, it can hardly be regarded as credible, but even if Moller made such a statement to Hoskins this could not be called even a scintilla of evidence to prove the formation of the conspiracy charged in the indictment.

Attention may be called by the Government to the testimony of Turner, to be found on Page 144. He had been in the employment of Mr. Shotter for years, and Mr. Turner says that Mr. Shotter offered him employment while he was with the Patterson Export Company, and while speaking highly of Mr. Patterson, expressed the opinion that the Patterson Export Company would not be in business very long because of a lack of capital. This conversation is alleged to have taken place in New York on the 5th day of March, 1907. According to Martin, a witness for the prosecution, and an officer of the Patterson Export Company, this Company did not go out of business until February, 1909, **which was nearly two years after this conversation, and ten months after the finding of this indictment.** By reference to his testimony, reported on page 130 of the Record, it will appear that Martin states, concerning the Patterson Export Company, "It commenced operations January 1st, 1906, and I remained with it until it liquidated in February of this year." The Record shows that Martin was testifying in May, 1909. This indictment was found April 11, 1908. (Page 10.)

(We may say, concerning Martin, that he was a detective for the Government and its chief witness. While an officer of the Patterson Export Company, a company shown to be a rival of the American, he managed to have himself employed by the Government to secure evidence against the American. It will also appear that while in the employ of the Shotter Company, a predecessor of the American, he took a complete list of all of their customers, which he subsequently utilized to work up a case against the American, the conclusion being unavoidable that he contemplated this while in its employ. Previous to February, 1909, he was in the employ of other rivals of the American.)

We are aware that where a conspiracy is charged, with overt acts alleged, the Government can show conspiracy by indirect or circumstantial evidence, but, in such a case, the evidence must prove guilt beyond a reasonable doubt, and must shut out every reasonable hypothesis except that of guilt.

We do not find any circumstantial evidence to prove the guilt charged. Certain it is that there is no evidence which is not absolutely consistent with the theory of innocence.

Even if all the parts of the unlawful agreement alleged were proven to have been parts of the agreement, and, more than this, to have been actually and repeatedly done by these Defendants, this, we submit, would not make out a case. Unless we are correct in this, then in the case of an interstate trader engaged (say) in the grocery business, an indictment would be good that charged the offense in terms of the statute and then stated as the basis of the charge, that this trader and his employees entered into an agreement to increase his business and their gains by false weights and measures, or by putting sand in the sugar, and the Government will prove a violation of this Anti-Trust Act by showing that false weights and measures were repeatedly used, or that sand was repeatedly put in sugar. The Prosecution (arguing in a circle), would say that these fraudulent practices are proven to be violative of the statute, because they were the result of a conspiracy agreement, within the

purview of the statute, and would claim that the conspiracy agreement was proven by the fact that these fraudulent practices were repeatedly indulged in.

The Government by elaborate evidence showed how the naval stores business was done, and how gains might be largely increased by resort to fraudulent practices. But such testimony is general, and has no bearing upon the exact questions in the present case. A careful analysis of it will show how entirely insufficient it is to justify the conviction of any one of the Defendants.

We respectfully insist that no act of any kind is shown that has any connection with the Sherman Anti-Trust Law, or evinces any violation of this Law.

We now ask attention to the specifications and to the evidence in connection with each specification. They are as follows:

1. "By controlling and manipulating and arbitrarily putting down and depressing the market and market prices of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices." (Page 6 of the Record). The Bill of Particulars (page 27) specifies the places at which this was done, as Savannah, Georgia, Jacksonville, Florida, New York City, London and Liverpool, England, and Hamburg, Germany, and the competitors against whom this was done as J. R. Saunders Co., Pensacola, Florida, John A. Casey Company, New York City, James Connor & Son, Baltimore, Patterson Export Company, Jacksonville, Florida; and that the afore-said manipulating, bidding down and fixing of prices was done by Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, Henry H. Bruen, and diverse other persons.

There is not a syllable of evidence to sustain these charges. It will not answer for the Government to say generally that they were sustained. The specific evidence ought to be

pointed out. On page 26 of the brief for the United States, in opposition to the petition for the Writ of Certiorari, it is stated that "each of the Defendants, Nash and Shotter, admitted that there had been a manipulation of the Savannah markets during the first months of 1908, and prior to the indictment, but each of them denied having any part in that manipulation." The reference to the testimony of Mr. Nash, (page 183), shows that he testified "at no time has the American Naval Stores Company ever manipulated the market; that is a fact to my certain knowledge. I go further and say that the market has been manipulated on several occasions during the life of the American, but never by the American. By manipulating the market I understand establishing it on an artificial basis, not warranted by conditions. I know of instances of manipulations by other dealers here and can give you in a general way." The difficulty with the Government's case, so far as this feature is concerned, is that there is not a syllable of evidence to contradict what Mr. Nash says, and that all of the testimony submitted by the Government may be true and yet Mr. Nash's evidence be also entirely true. We do not think that a piece of evidence can be quoted which justifies or warrants the conclusion that the American manipulated the market in Savannah or anywhere else, even if such manipulations would involve a violation of this statute. There was no attempt to show that there was manipulation in the places mentioned in the Bill of Particulars other than Savannah. There is no evidence to show that any dealer was compelled to go out of business by the American. If it be suggested that the Patterson Export Company was forced out of business, the sufficient answer is that this Company quit business in February, 1909, and the indictment in the present case was found April 11th, 1908, nearly a year before. The testimony of Mr. Shotter, as to manipulation, etc., is to be found on page 200 of the Record.

This page of the Government's brief calls attention to the fact that not only the Patterson Export Company was

no longer in existence, but that the Naval Stores Export Company was out of business.

The American Naval Stores Company, the Defendant in the Court below, was incorporated on the 2nd day of November, 1906 (Record, pages 218 and 219). As already noticed, the indictment was found on the 11th day of April, 1908. The evidence as to the Naval Stores Export Company going out of business, is that this occurred in December, 1905, nearly a year before the incorporation of American. (Page 130). We insist, therefore, that there is no evidence at all to show manipulation, or that any one of the parties mentioned in the Bill of Particulars had suffered from anything done by the American, even if such proof would have made out a case.

2. "By coercing and causing naval stores receipts which would normally and naturally flow to one port of the United States to be diverted to another port. (Pages 3 and 6 of the Record). The second paragraph of the Bill of Particulars, on page 27, undertakes to give the ports.

It appears without dispute that Savannah, as the largest naval stores port in the world, had special facilities for handling naval stores, and that they could be handled there more cheaply than anywhere else. The headquarters of the American are in Savannah, and the witnesses for the defense proved, without dispute, that there were ample and sufficient business reasons for bringing naval stores to Savannah, rather than Jacksonville, without imputing to the officers of the American either a violation of law, or the desire to do anything that was illegal, or reprehensible. The Government will find it impossible to point to any evidence that shows coercion, or anything that smacks of wrongdoing of any kind, legal or ethical, with reference to this specification.

3. "By purchasing thereafter at diverse times a large part of its supplies at naval stores ports known as closed

ports and wilfully and with the deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market, where its purchases, if made, would tend to strengthen prices and the market therefor, the said Savannah market being the basis or primary market in the United States for naval stores, and the said Defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on the basis of the market at Savannah." (Pages 3 and 6 of the Record).

We are at a loss to know what evidence the Government relies on to prove this specification, or to show that what was done has any connection whatever with the violation of the statute invoked. Messrs. Nash and Shotter explained the course taken by their Company, and their testimony is entirely inconsistent with the theory of guilt as to any specification, is consistent with all the proven facts, and if true demands the conclusion that their business course was consistent with the act of Congress and justified by the principles of safe and honest business.

4. "By coercing factors and brokers into entering into contracts with said Defendants for the storage and purchase of their receipts, and refusing to purchase from such factors and brokers unless such contracts were entered into." (Record, Pages 3 and 6.)

The Bill of Particulars (4th Paragraph on Page 27 of the Record) specifies "that the factors and brokers referred to were Consolidated Naval Stores Company, West, Flynn & Harris Co., and diverse other factors and brokers at this time to the Asst. United States Attorney unknown. Both parol and documentary evidence will be relied on by the Government. The contracts relied on by the Government in substance require the storage of naval stores receipts of such factors and brokers at naval stores terminals owned, controlled or operated by the National Transportation and Terminal Company. Duplicates of these contracts the Government is advised are now in the possession of Defendants." As the trial Court submit-

ted this specification to the jury just as if it had been proven, and assignments of error excepting to the charge, because without any evidence whatever to sustain it are made, we ask the indulgence of the Court if we notice this specification with some particularity.

By reference to Page 40 (Assignment No. 21), and Pages 56 and 57 of the Record, it will appear that the Court refused to give to the jury the instructions mentioned covering this point, and by reference to Page 44, (Assignment No. 34) and Page 61, it will appear that the Court charged the jury just as if there was evidence to prove this feature of the case. By reference to page 60, the following statement will appear: "In point of fact the Court withdrew from the consideration of the jury only three of the twelve specifications, the three withdrawn being those as to false statements, the issuance and circulation and hypothecation of fraudulent warehouse receipts and the alleged bribery of the employes of competitors. **The Court submitted all the other specifications.**" And further that "Before the retirement of the jury the Defendants excepted to the submitting to the jury by the Court of the specifications mentioned in the indictment, save only the three withdrawn, those three being those just stated, Defendants contending that there was no allegation in the indictment or evidence to justify such submission to the jury, and that the doing of this was otherwise illegal, and Defendants excepted to this submission by the Court and make the exception a part of this bill of exceptions." There is besides a separate assignment of error as to the submission of each specification.

As to the Consolidated Naval Stores Company contract, it will be observed that the charge is that this Company was coerced into **entering into the contract.** By reference to page 220 of the Record it will appear that this contract was entered into December 7th, 1905, **nearly a year before the incorporation of the American, and that the American was not a party to the making of the contract.** It was entered into by other parties. One of the parties was the S. P. Shotter Company, and the Government put in a letter from this Com-

pany, written by Mr. Myers, as its Vice-President, dated December 6th, 1906, advising the Consolidated Naval Stores Company that the Shotter Company had gone into liquidation, had sold its business in its entirety to the American Naval Stores Company, and had transferred its contract to the American, who would continue to act on the same lines as before. (Record, page 220.)

Immediately after this letter the following material statement appears on this page coming from the Government itself. After the statement that the Government put in this letter from Mr. Myers, it then appears that the Government introduced **"also correspondence showing that before the assumption of this contract by the American Naval Stores Company, at the instance of the American, the 10th and 11th paragraphs were stricken; that the 10th paragraph reads as follows: 'The Consolidated and Associates expressly agree that after the execution of this contract and as long as the same is in operation neither they nor either of them, their associates or successors will handle or deal in spirits of turpentine or rosin, or solicit or accept consignments thereof produced or originating west of the Alabama River;'** and that the 11th paragraph reads as follows: **'The Consolidated and Associates, their associates and successors, agree that during the term of this agreement they will not engage in buying or selling or in the exportation of naval stores either directly or indirectly except as aforesaid.'**" It therefore appears that before the American would take over the contract at all it had eliminated the features of it which might suggest a purpose to restrain trade or competition. As taken over the contract is entirely lawful and proper. It furnishes no evidence of a violation of the law.

Under no view can it be held that the Government showed that the American, **entered into** this contract, and that the trial Court was warranted in charging just as if it had been done so, and that this contract proved the specification.

There is not a syllable of evidence to suggest coercion in any legal or proper sense as to either contract mentioned in the Bill of Particulars.

The word "coercion" is used in the indictment, and the Government is held to this word. There is no element of coercion under the authorities or the facts. (See *Radich vs. Hutchins*, 95 U. S. 213, in connection with its facts, and the definitions of "Coerce," as given in the Second Volume of "Words and Phrases, Judicially Determined," pages 1241, et seq.)

As to the West, Flynn & Harris contract, the testimony shows that the American owned all the stock of the National Transportation & Terminal Company, which Company owned the yards at Jacksonville, and for the reasons given by Messrs. Nash & Shotter (reasons entirely consistent with all the testimony and contradicted by no one), they were compelled to have the stuff kept on these yards in order to make any profit out of the purchase of naval stores in the Jacksonville market. Jacksonville was without the water and other facilities furnished at Savannah, and it was necessary to transport naval stores from Jacksonville to Fernandina in order to reach deep water. Because of the expense incident to this removal the American wished a reasonable concession from parties from whom they bought. The American did not seek the contract, urge it, or request it. The representatives of the American were sought out by representatives of the West, Flynn & Harris Company, who were told in effect that the American had similar contracts with other factors, was not willing to discriminate, and was perfectly willing to make the contract or not make it. It appears from the testimony of the Government's witness West (Page 69) that the contract was finally prepared in his office in Jacksonville, the word "storage" in the contract, which was interlined, being in West's handwriting. The suggestion of \$400.00 as a lump sum came from Harris, another representative of the West, Flynn & Harris Company. It appears that West came to Savannah in order to secure the contract. (Page 70 of the Record). He admits in terms (Page 71 of the Record): "We are not under compulsion to sell to the American Naval Stores Company at a fixed price, and under no compulsion to sell on a given day. I am aware of

the fact that Farie & Company were buyers of naval stores in Savannah." He was also aware that the London & Savannah Company and the Patterson Export Company were buyers in Jacksonville and Mr. J. R. Walsh, Mr. T. T. Chapeau, and Mr. E. R. Middleton were buyers in Savannah," and "I was under no compulsion to sell to any one of them, but could have sold to any of them." "We could have sold the products that we had in our hands to anybody anywhere in the world that would buy them." He also testifies, (Page 72) "We wanted to get from the American Company the best price we could for the goods that we had on hand as a factor to sell; that is the simple truth of it. When we were talking to Mr. Shotter and Mr. Nash about making the contract they practically told us that they would make with us the same contract that they had made with the Consolidated and the Peninsula Company, and with Messrs. J. P. Williams & Company, and they said they would treat us like they treated other people. I remember Mr. Shotter having said that he would treat us like he did other people, and so far as I know, and I have been told by our manager that he has done so, never failed to treat us like he did the others in buying. I have been informed by our manager that they have lived up to the contract, and when I was there it was true. When we went to them to enter into this agreement to buy our naval stores they told us they would treat us like they did others; I think that was about the language Mr. Shotter used; and I understood by that they would make the same agreement to do the same things, and would not discriminate between anybody. They have lived up to the contract, which is still in force, and so far as my part of the transactions with them our relations have gone along very pleasantly under this contract, because I know nothing to the contrary." By reference to pages 72 and 73, it will appear that the \$400.00 item, which was really the only thing about the contract that they objected to seriously (See Richmond's testimony, on page 74), was to last only one year, and, as already stated, was put in at the suggestion of Mr. Harris.

On page 75 of the Record it will also appear that Mr. West testifies as follows: "At the time of the making of

this contract in June, 1907 there were quite a number of buyers in the Savannah market," and when asked if the Standard Oil Company was not a large buyer at the time he answers "They are large buyers here at times, there are times when they are not in the market; but they have an office here, and are recognized as buyers of naval stores." The testimony of Messrs. Richmond (Pages 74 and 75 of the Record), and Harris (Pages 75 and 76), show an utter absence of anything like coercion or compulsion. It was an ordinary case of business men trading together, giving and taking, and finally entering into a contract, which, while not altogether satisfactory to the West, Flynn & Harris Company, was accepted and signed. They were not bound to make it. They were under no compulsion of any kind. They were perfectly free to make it or not make it, as they preferred.

It was no more illegal or reprehensible than would be a stipulation by a cotton buyer that if parties wished to sell him cotton they must bring it and store it in his warehouse.

While the witness for the Government, Coachman, in one part of his testimony, refers to what he calls a "boy-cott" (meaning thereby that the American would not have bought from the Consolidated if it had not made the contract), yet when asked on cross-examination (Page 150) if he would be willing to cancel the contract he declines to answer, but diplomatically says he will refer it to his executive committee. The conclusion is irresistible that the contract in its entirety was satisfactory.

There is nothing illegal in contracting to buy from a party his entire product (Carter-Crume Company vs. Peurrung, 86 Fed. 442, Circuit Court of Appeals, Sixth Circuit, Davis vs. Booth, 131 Fed. 37, Circuit Court of Appeals, same Circuit).

In an article in the Harvard Law Review, of May, 1909, Mr. Morawetz, the author of the work on "Private Corporations," correctly states; "Individual manufacturers or producers often enter into agreements to sell their products to

certain dealers and no others. Exclusive trade agreements of this kind never have been held to be unlawful as creating monopolies." On the next page he states "The Anti-Trust Act was passed for the purpose of protecting the public against unlawful restraints of trade, and commerce, and not to protect individuals from the consequences of their own acts or contracts."

5. The 5th specification in the Bill of Exceptions reads: "By circulating and publishing false statements as to naval stores production and stocks in hands of purchasers and their immediate representatives" (Pages 3 and 6). A bill of particulars was asked as to this charge, and in compliance with the order of Court the Government specified (Page 28 of the Record, 5th paragraph) "that false statements were made by the Defendants themselves as to the stock of naval stores unsold in the hands of producers or their immediate representatives, that is to say, that the defendants inspired and caused to be published in the Naval Stores Review, and various other trade organs, at this time to the Assistant United States Attorneys unknown, and circulated throughout the naval stores trade, in various issues of those trade organs, statements grossly exaggerating the quantity of spirits of turpentine in the hands of producers or their immediate representatives, and in storage in Savannah, Georgia, and Fernandina and Jacksonville, Florida."

The Government did not offer any evidence whatever to sustain this charge, but abandoned it at the hearing, and the Court accordingly withdrew it from the consideration of the jury, and instructed the jury that there was no evidence. The Record makes no explanation to justify or excuse the making of such a charge.

6. The 6th Specification reads "By issuing and causing to be circulated and hypothecated fraudulent warehouse receipts." (Page 3, latter part, and page 6.)

Specifications of this serious charge, one well calculated to do great harm to the credit of the American Naval Stores Company, were asked for, and the Government thereupon, in compliance with the order of the Court (Page 28 of the Record) specified, by the 6th Paragraph of the Bill of Particulars as follows: "Under the sixth specification of the Court's order, the Government expects to show that the warehouse receipts referred to were, in substance and character, receipts issued by the National Transportation & Terminal Company for naval stores falsely claimed to be in its custody at Tampa, Fernandina, and hypothecated with the banks at Jacksonville, Florida; that said warehouse receipts were partly printed and partly written. No such receipts are in the possession of the Government, or exemplifications of the same, but it is believed by the Government that these receipts are in the possession of the Defendants, or have been by them destroyed." Further objection being made to the vagueness of this charge the Government specified, as the Bank with which these receipts were used the Florida National Bank and the Atlantic National Bank, of Jacksonville, Florida, and dates as being between May 1st, 1907, and April 1st, 1908.

The Government admitted that no evidence had been offered to sustain this charge, and it was withdrawn from the consideration of the jury. The Record is silent as to any reason or excuse for making the charge.

7. The 7th Specification reads: "By fraudulently grading, re-grading and raising grades of rosins and falsely gauging spirits of turpentine." (Page 3, latter part, and page 6, latter part.)

In its Bill of Particulars (page 28 of the Record, 7th paragraph), the Government specified as follows: "Under the seventh specification of the Court's order, the Government expects to prove that the practice of falsely and fraudulently raising the grades of rosin, **without re-inspection**, was carried on at Brooklyn, New York; Hamburg, Germany; Tampa, Florida; Jacksonville, Florida; Ludlow, Kentucky; East St. Louis, Illinois, and divers other places at this time to the As-

sistant United States Attorneys unknown. This grading up of rosins, the Government expects to show was done by the employees of the National Transportation & Terminal Company and American Naval Stores Company, acting under the direction of the respective managers of said companies' terminals at the points named, and by divers other agents and servants of all of said defendants, the exact names and character of said agencies being at this time to the Assistant United States Attorneys unknown."

The order of the Court (Page 26 of the Record) required the same specification as to falsely gauging spirits, but this Bill of Particulars does not notice the gauging of spirits; and although the 7th paragraph of the motion for a Bill of Particulars called for full specification as to this charge, the only amplification is to be found in the response to the second order for the Bill of Particulars, on page 31 of the Record, which undertakes to give the dates when this was done. The 7th paragraph of the motion asked that the Government state when, where and by whom the spirits of turpentine were falsely gauged. This information was never given, except in this general statement as to dates and the demurrer to the indictment was nevertheless overruled. We were entitled to this information.

Noticing first the specification of **falsely gauging** spirits of turpentine, it will be noticed that the Bill of Particulars confines it to **false gauging**, and that the charge rests upon the evidence of Hoskins, the effort being made to show by him that more than the usual and customary quantity of turpentine was taken out of the barrels and in that way merchants may have been defrauded.

But this cannot be called false **gauging**. By reference to any Dictionary, it will be ascertained that to gauge is "to measure or determine with a gauge, to measure or ascertain the contents, or the capacity of, as of a pipe, barrel, or keg." A gauge is defined to be "a measure, a standard measure, an instrument to determine dimensions, distances, or capacity, a standard." When a party takes turpentine out of a barrel,

no matter how improperly and fraudulently, he is not gauging, or measuring, the capacity of the barrel. He is not using a measuring rod or a gauge. Suppose a party were to swear in a judicial proceeding, and the statement was material, that he had never falsely gauged a barrel of turpentine in his life, he could not be convicted of perjury if the prosecution showed only that he had fraudulently taken turpentine out of a barrel after it had been filled in order to deceive and defraud.

The authorities requiring a strict correspondence between the *allegata* and the *probata*, go very much farther than it is necessary for us to go in this case. (See *U. S. vs. Denicke*, 35 Fed. 410, 411, particularly the case there cited and quoted with approval; *The Queen vs. Satchwell* Law Reports 2 Crown cases Reserved 21; *Haupt vs. the State*, 108 Ga. 53, (2), 56, 57 and 58 (latter part); *Staples vs. State*, 114 Ga. 256, *Wilson vs. State*, 115 Ga. 206, *Thompson vs. State*, 92 Ga. 448.

This point is material because the Court charged the jury just as if evidence had been submitted to show false gauging, and it may be that these Defendants were convicted because the jury though they were guilty of false gauging and false gauging only. The instructions to them at least justified the conclusion that they could convict the Defendants if proof were submitted **as to any one of the twelve specifications**. See pages 42, (the concluding statement of the 30th assignment of error) 44, (the 36th assignment of error), and pages 61 and 62, (Parts of the Bill of Exceptions).

There is no real evidence of any improper conduct by anyone in connection with turpentine.

According to two witnesses, Hoskins was discharged by one of the Defendant companies not for fighting, as he swears, but for attempting to draw the wages of a fellow-laborer on a false order. The witness Dan Wilson does not corroborate him. He does not testify to anything suggesting any impropriety. He uses the word "regulating," but this is a word commonly used, and there is nothing wrong in its use or in the doing of

what is referred to by the word. See the testimony of the Government's witness Register, on page 171, of Elson, page 173, and of Tison, on page 174.

Even if Hoskins testifies to anything that was wrong, neither he nor any other witness connects any one of the Defendants with it—Moller, or anyone else. He is entirely contradicted by Tison, by Moller (Pages 177, et seq.), and by Shea (Page 170). He is corroborated by no one.

All the evidence that refers to the yards at Jacksonville, at which alone the Government attempts to show this was done, there being no effort whatever to show anything like false gauging anywhere else, is favorable to the Defendants and inconsistent with the idea that anything improper or fraudulent went on at these yards. See the testimony of West (Page 72), of Harris (Page 76), and of Parker (Page 104). All of these witnesses were introduced by the Government. The testimony of the last named witness is important, because he was supervising inspector for the State, and it was his duty to visit the yards frequently and inspect them. He never saw anything to cause suspicion.

The unreasonableness of the Government's theory appears from the undisputed fact that the great bulk of the turpentine was intended for export, and would be sold by weight and not by the contents of the barrel. There was, therefore, no object in taking too much turpentine out of the barrels, and no possible advantage to the owner of the turpentine. It appears that it was usual and customary, because of the expansion of turpentine, to take some out of the barrels after it had been measured. We repeat there was no purpose in taking out a fraudulent quantity, because the bulk of it was sold by weight and not by contents. This fact appears from Moller's uncontradicted statement. While he did not prepare the statistics concerning which he testifies, in his direct examination, he says, on re-direct, without any evidence whatever to contradict him "I will swear that the bulk of the turpentine does go foreign. I am certain about it. I kept track of turpentine close enough to know that all-right." (Page 179).

In the Court of Appeals the Government claimed that their theory of fraudulent practices in the extraction of an undue quantity of turpentine was sustained by the testimony of Dill, referring to the controversy that he had in regard to the allowance for the difference in temperature. Dill was in charge of the Brooklyn yards. He was not an employee of any one of these Defendants, and the yards did not belong to any one of them, although he acted as the attorney of the West Virginia American under power of attorney in some financial matters, receiving, however, no salary from this Company. This controversy that he had with the American Naval Stores Company is mentioned on page 164 of the Record. Instead of this testimony corroborating the theory of the Government, it is inconsistent with it. This theory is that improper quantities of turpentine were taken out of the barrels, and with fraudulent purpose they were sold short, and that there was a conspiracy for this purpose. Dill was Manager of the American Naval Stores Company of New York. (The American on trial is the American Naval Stores Company of West Virginia, with its headquarters at Savannah) and President and General Manager of the National Transportation & Terminal Company of New York, the Company on trial being the National Transportation & Terminal Company of New Jersey). The connection between the different companies was, of course, intimate, while they were distinct corporations. **It is simply incredible that this conspiracy was going on and yet Dill was protesting against the doing of the very thing which the conspiracy was endeavoring to accomplish.** Protest from a co-conspirator would be most extraordinary.

The theory of the Government is also met by the fact that, notwithstanding the immense business done, the complaints of short measurements, as to turpentine sold in this country, amount to one isolated case, which concerns a few barrels, and which the Government witness himself accounts for upon the idea that the turpentine may have leaked. The only testimony on this line is from Wagner (Page 121), Hart (Page 123),

and Turner (Page 144). All of it appertains to one isolated case.

Another significant fact is, so far as turpentine is concerned, the undisputed evidence of Dill is (latter part of page 168) that "the greater part of the turpentine came from Brunswick, Mr. Downing, of The Downing Company, I should say 90 per cent. perhaps." The Record does not show or suggest any connection between Downing or The Downing Company, and any one of the Defendants.

It will not be claimed, however, by the Government (it has not been heretofore) that this specification as to falsely gauging spirits of turpentine has reference to any place except the yards at Jacksonville, Florida. There was no attempt to show false **gauging**, or measuring, anywhere.

There is no evidence that any of the spirits of turpentine was ever sold to anyone by measurement, or that anyone was deceived or defrauded by any sale of turpentine.

As amplified by the Bill of Particulars, there is no charge of false grading or re-grading.

The Bill of Particulars adds the words, "without re-inspection," and there is no evidence that what was done was done without previous re-inspection. On the contrary, the evidence of Dill and Smith shows that there was re-inspection in Brooklyn. If their evidence on this subject be disregarded, then there is no evidence at all as to re-inspection.

The Government's evidence on this specification is confined to the Brooklyn Yards, which belong, under the undisputed evidence, to a Company not indicted; and to the conduct of the employees of a Company not indicted; and to merchandise which did not belong at the time to a Company indicted. The undisputed evidence of Dill (page 160) is that, "The yards in Brooklyn in which naval stores were kept are the National Transportation & Terminal Company of New York" (the New Jersey Company is the one indicted) "and George L. Hammond & Company, known as the Union Naval Stores Company, owned and controlled by George L. Hammond & Co., the two separate and distinct yards. The latter yard does not belong

to either of the companies known as the American, for short. There is a public yard where the National Transportation & Terminal Company keeps its naval stores, and other parties keep naval stores there." On page 161 his undisputed evidence shows that while he bought the greater part of his rosin stock from the West Virginia American (which is the Company indicted), the rosin at the time referred to by the Government's evidence belonged to the New York American, a distinct corporation.

In the absence of a prohibitory statute, there is nothing unlawful or improper in a purchaser, after he has acquired title to rosin, grading it as he thinks it ought to be graded, regardless of any previous grading. It would stand like cotton, or any other merchandise. A purchaser might buy cotton as of a certain grade and honestly and fairly determine that it would stand a better grade, and re-grade it accordingly.

The undisputed evidence of Dale and of Smith, the latter being the Government's witness, is that no attention was paid in Brooklyn to the Southern grades of rosin, and that it was regarded there without regard to the previous grades.

There are only two States as to which any evidence was offered as to what might be called an irregularity or impropriety, either as to turpentine or rosin. One of these is Florida, and the charge as to Florida is confined to an alleged false gauging of turpentine. The other is New York, and it is charged that in Brooklyn the grades of rosin were falsely and fraudulently raised without re-inspection. So far as we have been able to ascertain, the only law in Florida on this subject, either as to rosin or turpentine, is that which punishes the adulteration of turpentine. There is no Florida law making it a crime to change a grade, and we repeat that it is not charged that any one of the Defendants changed the grade in Florida, or that this was done in Florida with any of the rosin belonging to the Defendants, or any of them. It is not charged that there was any adulteration of spirits anywhere. The Florida legislation on the subject is confined to the act of 1903, entitled "An Act to prevent and prohibit the adulteration of spirits of turpentine and naval stores, and to provide for the

appointment and duties of a supervising inspector of naval stores, and to prescribe forfeitures and penalties for violating, and methods for the enforcement of the provisions of this act." (Florida Laws, 1903, page 44). The General Statutes of Florida, adopted in 1906, Section 3131, et seq., pages 1192, et seq., did not in any way enlarge this legislation.

The undisputed evidence is that no inspection laws prevailed in any of the States of the Union save only Florida and Georgia.

There is no Florida law providing for official gauging, and therefore if an excessive amount of turpentine was taken out of a barrel it would not do violence to any official gauging.

This Court will take judicial cognizance of the laws of the other States. (Lamar vs. Micon, 114 U. S., 218-223.)

This feature of the Government's case, as to the fraudulent raising of rosin grade, without re-inspection, must fail, and the exception to the charge of the Court, submitting it to the jury, must prevail if only because the allegations in the indictment, as amplified by the Bill of Particulars, are not proven, but, on the contrary, disproved. The Bill of Particulars charges (page 28, paragraph 7) that this "raising of grades of rosin without re-inspection was carried on at Brooklyn" and other places, **"by the employes of both the corporate Defendants, acting under the direction of the respective managers of said companies' terminals at the points named, and by divers other agents and servants of all of said Defendants,** the exact names and character of such agencies being at this time to the United States Assistant Attorney unknown."

The effort was made to prove this charge by O'Keefe and other laborers, who had left their employment under a strike. The chartering of the four different companies was established. It was shown that the "American Naval Stores Company," a West Virginia corporation and one of the two corporate Defendants, was chartered on November 2nd, 1906. (Pages 218-219.) This is the company with its principal office at Savannah. It also appears that the "National

Transportation & Terminal Company of New Jersey," the other corporate Defendant, was chartered December 4th, 1902, "to do a warehouse and terminal business" (page 219). It was shown that the "American Naval Stores Company of New York" was chartered on the 19th day of November, 1906. (The Record has 1908 as the year, but this was corrected by a consent order so as to read 1906—see page 230 of the Record.) The "National Transportation & Terminal Company" was also incorporated in New York on the 22nd day of March, 1907, with the same powers as the National Transportation & Terminal Company of New Jersey (page 227).

The uncontradicted evidence of Dill (pages 159, et seq.) shows that the rosin in these particular yards did not belong to either of the Defendant corporations that the yards did not belong to them, and the employees, including the manager, were not the employees of either of these Defendants. Boardman (page 153) corroborates him. Nobody denies what he says as to these matters. O'Keefe testified that he was employed by the American Naval Stores Company of New York. He says "I do not know whether it was a New Jersey or a New York company. Assuming there were two companies, a New Jersey corporation and a New York corporation, I cannot tell you that the company which I mentioned as the American Naval Stores Company was a New Jersey corporation. I do not know whether Mr. Boardman was treasurer of the New York corporation or the New Jersey corporation." The manager of the yards was not an employee of any Defendant. According to both Dill and Boardman O'Keefe and his fellow-workmen and the manager (Ketchum) were all employees of the New York National Transportation & Terminal Company, the New York Company and not the New Jersey company, which is the one indicted. In any event it cannot be said that O'Keefe proves the allegations in the Bill of Particulars, and there is no effort to prove these allegations as to ownership or employees.

It is no reply to suggest that the American Naval Stores Company, (the West Virginia Company and the Defendant),

owned the stock in these other companies not under indictment, **because the indictment presents no theory of this kind.** It has no allegation to support this theory. Regardless of the ownership of stock, their distinct entity continued, and neither of the companies indicted would have been liable to a party contracting with the two companies not indicted, or for a tort committed by those companies or either of them. (Pullman Co. vs. Missouri Pac. Rd. Co., 115 U. S. 587; Conley vs. Alkali Works, 190 U. S. 409; Exchange Bank vs. Macon County, 97 Ga. 5 et seq.)

If wages had been due any of the men employed about the Brooklyn yards, or to the manager (Ketchum), they could not have held any of the Defendants. They were not even officers of the company that employed them and owned the yards. (Page 165).

It is not charged, we particularly stress, that the formation of these companies was wrong or fraudulent, and there is no theory in the indictment that their formation was a part of the conspiracy, or has anything to do with the conspiracy charged, or that the American Naval Stores Company of West Virginia, the corporate defendant, utilized them in a conspiracy to restrain trade or to monopolize trade, or for any unlawful or improper purpose. According to the uncontradicted testimony of Boardman (Page 153) the New York American looked after the finances in New York. Boardman's salary was paid exclusively by the New York Company. The West Virginia or Savannah Company, the one under indictment, contributed no part of his salary. These companies were in actual existence, doing business. and the case of the alleged regrading without reinspection fails. because a number of allegations are not proven.

There is really no testimony to justify the conclusion that Dill, who was the Manager of the New York American, and the President and Manager of the New York National Transportation & Terminal Company, or that Ketchum, the Manager in the Brooklyn yards, were guilty of falsely re-

grading rosin, and particularly without its previous reinspection. There is no evidence to connect any one of the Defendants convicted with such a practice. Dill's testimony is full, complete and satisfactory. He is recalled, identifies his records, which completely corroborate him and are utterly inconsistent with the extravagant testimony of O'Keefe and the other strikers. (See page 172 of the Record).

By reference to page 218 this significant statement will appear: "When the witness, C. W. Dill, was recalled by the Defendants, the testimony as to the slips and reports mentioned, these were turned over to the attorneys for the Government for examination, but they were not introduced in evidence." We may safely say, therefore, that these records showed the correctness of Dill's testimony. He is also corroborated by Mahoney, a witness introduced by the Government, whose testimony is to be found on page 96.

He is corroborated also by Charles E. Smith, a witness for the Government, whose testimony is important. He is the authority, as his father was before him, touching the standard types. They are furnished by him. He says, without dispute (Page 81): "It follows that if it is found a barrel of rosin grades a low grade by the actual type, it is so sold in the market according to this type without reference to what the grade in Georgia or Florida was; just as I find it I sample it. The way that I understood it is that it is sold that way, and the seller is not bound by the previous inspection, nor is the buyer bound by it, but it is sold according to the standard type which I furnish to the trade." He also corroborates Dill as to inspecting 10% of the rosin, his language being (Page 81): "If I had 500 barrels I am supposed to go through the whole of them, sometimes I only take 10%, and grade the samples therefrom with these types."

The uncontradicted testimony of Dill shows that he had never lost a customer on account of complaints and a remarkable exemption from complaints, the amount of business done being considered.

The Record shows that the most exhaustive means were resorted to to secure testimony. The fewness of complaints is in itself a demonstration in favor of the business methods of the American Naval Stores Company. According to the uncontradicted evidence of the Defendant Shotter, the American had as many as 4,000 customers. All the testimony indicates that it did a very large business. During the year 1907 it handled 42% of the total crop of turpentine and 58% of the total crop of rosin (Page 184). The witnesses put up by the Government to show inferior grades of rosin were Post, who testifies to an examination of 100 barrels in a car of rosin, using the type that he had, and stating concerning this type that he could not swear that the type was right, and admitting that he was not an expert. (Pages 107 and 108); Sercomb, who testifies concerning two barrels (Page 110); Berghoff (Pages 126 and 127), (who says "I cannot even approximate the number of barrels on which complaint was made by us to the American during that period; more than ten, about twenty-five, or perhaps more, I won't say;" and again: "We bought approximately 3,000 barrels during that period. We renewed the type about every six months; we got them from the East somewhere. When we would make a complaint sometimes a representative would come up and see about it with the purpose of giving us satisfaction, and finally all those little matters were adjusted between us, and we are still buying rosin from the American); Austin, who testifies in a general way, proving nothing (Page 145), and saying only: "We found more or less discrepancies between the deliveries and the type samples, which we kept on file in our laboratory for comparison with deliveries." He also testifies that he used the same box and types during the year. Other testimony shows that it is necessary to change the types very often in order to secure anything like accuracy. These are all the witnesses who refer to inferior grades of rosin. We have already noticed those who testified to a few barrels of turpentine.

There is no evidence whatever to show that a single customer left the American on account of shortages of either rosin or turpentine, or that anyone was ever defrauded by

the American, or any other Defendant. Post, Sercomb and Berghoff together cover 127 barrels of rosin. Austin does not mention any number. In 1907 the American handled 1,325,000 barrels of rosin. On this basis it is safe to infer that they handled in three years nearly four million barrels. In 1907 it handled 284,000 barrels of turpentine, and in three years probably 752,000 barrels. Complaints as to wrongs cover seemingly 127 barrels of rosin and 30 gallons of turpentine. The absence of testimony is most significant. The complaints in view of the number of customers, and the size of the business, are infinitesimally small. They demonstrate that the business done by the American must have been fair and free from just cause of complaint. The Defendants showed by Knox (page 170), and by LeHardy (page 173), how common complaints were as to lumber and cotton from purchasers.

The testimony for the Government shows clearly how experts will frequently differ in regard to grades of rosin; that no two of them will grade 500 barrels alike, and when non-experts attempt to judge rosin by the types they are very apt to be wrong, particularly if the types are not frequently changed.

According to the testimony of the Government's witnesses, the scraping off of the old marks was perfectly apparent, and this fact was inconsistent with the theory that the purpose in the scraping was a fraudulent one, or that there was any design to deceive. Dill testifies, without dispute, that when the marks were changed it was his duty to have the old marks scraped off, otherwise parties might be misled; in other words the barrels advertised to every purchaser, who would look, that the old marks had been scraped off and new marks substituted.

The Government showed that reports were regularly made from Jacksonville to the Savannah office, and it may be that reports were also made from New York; and it would seek to draw the inference from this fact that the Savannah representatives of the American were cognizant of fraudulent practices. **But there is not a syllable of evidence to show**

that any inculpatory report was made to any one of the Defendants, or was ever seen by any one of them, or that any report was made or seen which suggested, or ought which to have suggested, that fraud was being practiced.

Assuming, however, that there was evidence that something wrong was done in the Jacksonville yards, or in the Brooklyn yards, by some employes, we earnestly insist that **there is no evidence to warrant the conclusion that any of the Defendants had any connection with the wrong.**

There is no evidence to show that any information of wrongdoing, by report or otherwise, was ever conveyed to them.

The real effort in this case was to show that the Defendants in the trial Court were guilty of fraudulent practices, and, therefore, the jury ought to convict them, perhaps on general principles.

If they were charged with fraud even on the civil side of the Court, proof of fraud would be required. It is never presumed, and the more conservative the Court the more careful it is to require real proof. It is a charge easily made. It is never sufficient to cast suspicion upon the conduct of a party charged with fraud even if it could be said that the evidence in this case goes to this extent. As said by the Court in *Lalone vs. United States*, 164 U. S. 257, which was a suit in equity brought to recover certain moneys, when discussing the evidence as to fraud: "It may be circumstantial, but it must be persuasive. A mere preponderance of evidence, which at the same time is vague and ambiguous, is not sufficient to warrant a finding of fraud and will not sustain a judgment based on such finding." This observation would, of course, apply with special force when a criminal charge is made.

As well said by Judge Story, in *The Ship Henry Eubank*, 11 Federal Cases 6376: "It is not the habit of any Courts of justices to yield themselves up in matters of right to mere conjectures and possibilities."

As well said by Judge Bleckley, in the Supreme Court of this State, *Lewis & Company vs. Thurber*, 62 Ga. 26: "Fraud must be proved; suspicion falls far short of belief. It is a tendency or inclination to believe, not belief."

There is not a scintilla of evidence to show that any one of the parties convicted had the slightest connection with what the indictment calls false gauging of turpentine, even assuming that Hoskins' evidence is credible and proves false gauging by some one.

He does not even connect Moller with it. According to Moller's uncontradicted evidence, if any irregularity occurred, not only he knew nothing about it, but there is no reason to believe any other Defendant was cognizant of it. He is fully and absolutely corroborated by the Defendants sworn in the case. There is no room for even suspicion of guilt much less any real evidence.

So far as concerns the conduct alleged by O'Keefe and others to have occurred in the Brooklyn Yards, even if either of the corporate Defendants or any representative of the corporate Defendants had been connected with it, there is not a syllable of evidence to show that any one of the parties convicted had the slightest connection with it. In addition to this the charge as amended by the Bill of Particulars requires proof that the Defendants were not only guilty of falsely and fraudulently raising the grades of rosin, but that they did this without previous reinspection. As already stated, there is no evidence at all to show that there was no reinspection. The evidence of Dill and of his records show that this charge was not true in point of fact, but in the nature of the case no officer, particularly one living in Savannah, **would know of a failure to reinspect.** Certainly, there is an utter absence of evidence to show such knowledge. The answer of Shotter to the last question (Pages 210 and 211 of the Record), as to the absence of knowledge, and as to the fact that a report would not show any false grading, and particularly without reinspection, is entirely uncontradicted.

An officer cannot be convicted of crime by showing that some agent or employe of his corporation has been guilty of crime.

Particularly is this true when under the verdict the corporation of which he is an officer is not guilty, and it is charged that the corporation did the things through the officer, and that the officer did it for the corporation.

Even if it can be said that Woods or Dill, or some other employe committed the crime charged, and if they were employes of the Defendants convicted, it cannot be said that this made the Defendants guilty. A President of a bank may be civilly liable if, because of his neglect of duty, a subordinate is permitted to steal from the bank, but it would be monstrous to hold that he could be punished criminally for what the subordinate has done, in the absence of satisfactory proof that he was a *particeps criminis*. The statute invoked by the Government undertakes to punish "every person who shall **engage in** any such conspiracy;" but his engaging in it must be proven, and, in a criminal case, beyond a reasonable doubt. The words "engage in" imply actual and positive participation.

Even in a case where an expressman was tried for breach of a statute requiring the recording in a book kept for that purpose of liquors received for transportation, where it appeared that the failure to make the proper entry was the act of a servant, the Massachusetts Court held that "it is not enough that it was done in the course of the servant's employment in the master's business; to convict him, the master, for the act of the servant, the Government must show that the master participated in the act or countenanced it, or otherwise agreed to it." This is the case of *Commonwealth vs. Reilly*, reported in 81 N. E. 881. See also *Commonwealth vs. Joslin*, 158 Mass. 482, and 1st Bishop on Criminal Law, 7th Edition, Section 889. The Iowa Court well says, through Judge McClain: "It is well settled that a principal is not thus liable for the acts of his agent or servant, even if done in the general course of the employment, unless they are directly authorized or consented to

by him. For the authority to do a criminal act will not be presumed." (State vs. Carmien, 106 Am. State R. 357).

On page 832 of 149 Federal, Judge Hough endorses the view of the Court in *People vs. Clark*, 14 New York Supplement, 642, where it is held: "Where the car-heating Act has been violated by the company operating the railroad, the officers and directors of such company are not liable merely because they are officers and directors, **but it must be shown that they personally participated in the commission of the offense.**"

If this be true, where the offense charged is a failure to comply with a statutory duty, how much more is it true in a case like this which requires positive participation, because it is only the officers who "engage in" the conspiracy who are subject to its penalties.

In *Vernon vs. United States*, 146 Fed. 121, the judgment of conviction was reversed by the Circuit Court of Appeals for the Eighth Circuit, because there was "no substantial evidence to warrant a finding that the defendant was guilty, and there was total failure of proof as to the venue" and the Defendant was, therefore, entitled to a peremptory instruction of acquittal. Two propositions are there laid down. One is "Circumstantial evidence is insufficient to warrant a conviction in a criminal case unless it is such as to exclude every reasonable hypothesis save that of guilt of the offense charged, and cannot be reconciled with the theory of innocence." Another is: "Where circumstantial evidence is relied on to establish defendant's guilt of the offense, the circumstances must be proved and cannot themselves be presumed." The Court quotes significant observations of this Court in *U. S. vs. Ross*, 92 U. S., latter part of 283, in a civil case: "These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences, presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of law is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are so uncertain."

The only positive or direct evidence bearing upon the charge made in the indictment is from the Defendants. Unless they commit flat perjury, they are absolutely innocent. As their testimony is in no wise disproved, it cannot be said that the case has been made out, or that there was any real evidence of guilt.

We will hereafter notice the case as to each of the parties convicted separately, and all the evidence which connects them with the case.

We have noticed rather fully these two specifications as to falsely gauging and the fraudulent re-grading without inspection, because they are the only specifications among those not abandoned by the Government which involve moral or ethical wrong, and, therefore, in justice to clients, we have endeavored to show that they have not been sustained.

8. The Eighth Specification reads: "By attempting to bribe employees of competitors and factors, so as to obtain information as to competitors' business and stocks." (Pages 4 and 6.)

In compliance with the order of the trial Judge to give a Bill of Particulars as to this charge, the Government gave the Bill of Particulars to be found on pages 28 and 29 of the Record, paragraph 8. It undertakes to give the names of the competitors whose employees an effort was made to bribe (giving the names of John R. Young and the Naval Stores Export Company), the names of the employees, and the names of the persons in the employ of the American Company who made the effort. And yet the Government subsequently abandons this specification, and the trial Judge withdrew it from the consideration of the jury on the ground that no evidence had been offered to substantiate it. (Page 43 of the Record, the latter part of it.)

9. The Ninth Specification reads: "By inducing consumers by payment of bonuses and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants

to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices. (Pages 4 and 6.) The Bill of Particulars as to this Specification (Page 29) reads: "Under the ninth specification in the order of the Court, the Government expects to prove that for the postponement of deliveries while the Defendants were depressing the market Lilly Varnish Company of Indianapolis, Ind.; Gesellschaft Schering, of Berlin, Germany, and Conrad William Schmidt, Dueseldorf, were offered bonuses, and in order to force the postponement of deliveries at such times Ernest C. Bartels, Aktien Gasellschaft, Hamburg, Germany, was threatened with boycott. Payment of bonuses and threats of boycott were made to and against divers other consumers to the Assistant United States Attorneys at this time unknown. The payment of said bonuses and the threats of boycott were made by the Defendants, and by their special agent, E. S. Trosdal, and the manager of the Cincinnati, O., branch office of the American Naval Stores Company and by other agents and representatives whose names and exact relations to said Defendant are to the Assistant United States Attorneys unknown. The Government is not in possession at this time of the contract described in said specification except the contract between the American Naval Stores Company, and Lilly Varnish Company, copy of which, in substance, is as follows:

Dated February 12th, 1907.

American Naval Stores Company, Chicago, Ill.

Sold to Lilly Varnish Co., Indls., Ind. Freight prepaid to Indls., Ind. Ship via Penna. Co. when ordered. Terms sight draft with bill of lading attached, upon shipment of goods. This order not subject to cancellation. -----bbls.-----
Rosin, -----per 283 lbs. 2-6500 gal. tanks, turpentine, to be billed at flat Savannah freight paid to Indls. These tanks to be taken before Dec. 31, 1907. Sight draft B. of L. attached. American Naval Stores Co. by W. E. Holmes. Accepted Chas. Lilly.

but it is advised and believes that the Defendants have in their possession duplicates of these contracts."

We do not think that the Government will contend that there is a syllable of evidence that sustains remotely this specification. And yet it was submitted to the jury by the trial Judge just as if it had been proven, and assignments of error were duly taken to this submission. It is noticed, therefore, as having an important bearing not only upon the question as to whether a verdict was justified, but also upon the question as to the propriety of submitting this to a jury. While the names of a number of parties are mentioned in the specification as to whom it is alleged the Government expected to prove the postponement of deliveries, payment of bonuses, and threats of boycott, the testimony mentions only one party, namely, the Lily Varnish Company, and as to this company, there is not a syllable of evidence to sustain any feature of this specification. The witness for the Government, and the only witness who deals with this specification at all is Mr. Lily, whose testimony can be found on page 124. All that he proves is that certain deliveries were, as he claimed, not promptly made—something that might happen in any business, and is fully and thoroughly explained. It also appears by his testimony that the matter was satisfactorily settled. By reference to page 222 of the Record it will appear that the Government introduced the correspondence and bill of the Lily Varnish Company with the American Naval Stores Company, and it appears that there was a complaint of some delay in the shipment, and that subsequently a bill was made out by the American Naval Stores Company against the Lily Varnish Company for the tank shipped, and a memorandum was attached making an allowance for **the delay in the transit** of the car of \$91.99. Mr. Lily's testimony shows that the matter was satisfactorily settled; that **the delay was due to the railroads**; and that no Defendant was in anywise to blame for this delay. (Page 125 of the testimony.)

And this is the entire foundation for this formidable specification as to postponement of deliveries, payment of bonuses and threats of boycott and its submission to the jury!

10. The tenth specification reads as follows: "By making tentative offers of large quantities of naval stores under pre-

vailing markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases made on a market thus depressed by the aforesaid fraudulent offers." (Pages 4 and 7.)

The Bill of Particulars alleges concerning this specification (page 29 of the Record), the "Government expects to prove tentative offers of spirits of turpentine made to Ernest C. Bartels, Acktein Gesellschaft, Hamburg, Germany, by the following representatives of the American Naval Stores Company, to-wit: The American Pine Products Company and Hugo Wirtz, and divers other tentative offers of naval stores made by the American Naval Stores Company to parties and at places at this time to the Assistant United States Attorneys unknown."

There is no evidence whatever to sustain this charge, or its submission to the jury. There is absolutely nothing to indicate or to suggest any violation of the Anti-Trust Act in the conduct of anyone of the Defendants remotely connected with a specification of this kind.

11. The eleventh specification reads: "By at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, **which said prices would be ruinous to themselves, as well as to their competitors.**"

12. "By wilfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production."

In response to the order, the Government gave the following particulars as to these two specifications (page 30 of Record):

"Under the eleventh and twelfth specifications in the order of the Court, the Government expects to prove that in the months of November and December, 1907, the American Naval Stores Company, at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by

the manager of the New York office of the American Naval Stores Company, and at Philadelphia, Pa., by the manager of the Philadelphia branch office of the American Naval Stores Company, and divers other sales made at divers other places and on divers other times to consumers and by representatives of the American Naval Stores Company, at this time to the Assistant United States Attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market at those times depressed below the cost of production by the Defendants by the various means and in the manner specified in the first and second counts of the indictment."

We submit that no evidence will be found in the Record to justify these specifications, or their submission to the jury.

The eleventh specification is remarkable upon its face. Even if proven, we do not see how tactics of this kind infract the law, or what is in them to give any color to the charges in the indictment.

An effort was made to show something that might suggest to a suspicious mind some irregularity of some sort at the Philadelphia office. There is absolutely nothing in the evidence of the Government to justify even a suspicion of irregularity. We produced the manager of that office in D. W. Fletcher, whose testimony can be found on pages 169 and 170 of the Record, and also on page 180, when he was recalled. **His testimony is entirely consistent with every fact proven by the Government, and with every fair inference from the facts.**

Before concluding this branch of the case we beg the attention of the Court to some views which apply to the case in its entirety, and to the question of the lawfulness of the conviction of any Defendant.

They also apply to the failure of the jury to convict the American Naval Stores Company, and (what is the result of the jury's conduct) to the acquittal, in legal effect, of this company.

However illogical it may be, let us assume that it is a sound legal proposition that the officers of a corporation may conspire for a corporation and, at the same time, with the corporation itself to restrain or monopolize interstate commerce, to be effected by the use of certain specified means.

In the case at bar it must be admitted that the means by which the alleged conspiracies charged were to be effected, and the means which the Government attempted to prove (we say "attempted to prove," although in a number of instances not a syllable of evidence was offered) were means which could only have been used by the American Naval Stores Company, the only trader mentioned in the indictment, not by the officers of the companies as individuals.

Eliminating the three specifications abandoned by the Government, and analysing the nine remaining for the purposes of this point, we find that they are:

1. By controlling, etc., naval stores at Savannah, so that **competitors** could not sell except at ruinous prices.

But we ask whose competitors? And the answer must be those of the American Naval Stores Company.

2. By coercing and causing naval stores receipts which would normally flow to Fernandina and Jacksonville, and Brunswick, to be diverted to the Port of Savannah.

But whose receipts? The answer must be the American Naval Stores Company's receipts.

3. By purchasing a large part of its supplies at closed ports, and refraining from purchasing at Savannah.

But who was the purchaser and who is charged with doing the acts complained of? The answer must be the American Naval Stores Company.

4. By coercing factors into entering into contracts for the storage and purchase of their receipts, etc.

But who made the alleged contracts with the factors and brokers? The answer is again the American Naval Stores Company.

5. By fraudulently raising the grades of rosin without re-inspection, at Brooklyn, etc.

But who is referred to in this specification, and in the evidence? The answer is the National Transportation & Terminal Company, of New Jersey, a subsidiary company of the American, as the Government claims.

6. By inducing consumers by payment of bonuses and threats of boycott to postpone the dates of delivery, etc.

Delivery from whom? Payments of bonuses by whom? Threats of boycott by whom? The answer must be the American Naval Stores Company.

7. By making tentative offers of large quantities of naval stores under prevailing markets, etc.

Whose tentative offers? The answer must be those of the American Naval Stores Company.

8. By at divers times selling spirits of turpentine and rosin below the actual cost to themselves, so as to compel competitors to meet said prices, etc.

Who is charged under this specification, and whose competitors were compelled to meet such prices? The answer must be that the charge is against the American Naval Stores Company, and the competitors must be those of the American only.

9. By wilfully and arbitrarily fixing the price of spirits of turpentine below the cost of production.

Who is charged with doing this? The answer must be the American Naval Stores Company.

Now, if the verdict rendered can be called a legal and complete verdict, and not subject to the objections heretofore made to it, it will doubtless be admitted by the Government that it in legal effect acquits the American Naval Stores Company and the National Transportation & Terminal Company, and the jury, in effect, therefore, have said that these two corporations were not guilty of a conspiracy to restrain trade or to monopolize trade, to be effected by the use of the specified means or any of them. The result is that we are confronted with this anomalous situation: that the officers of two corporations were charged with having entered into a conspiracy with the corporation mentioned in the indictment, to be effected by the means specified, and which the Government will say it at-

tempted to prove were actually used by these two corporations, are convicted, notwithstanding the fact that the American Naval Stores Company, which alone is charged as using the means and which in the very nature of the case was the only Defendant which could have used the means, was found not guilty.

The case is still stronger when it is remembered that the indictment does not charge that the officers controlled or dominated the policy of the Company, nor does the proof show that any one of the parties convicted was a party to any effort on the part of the American to make use of any of the means specified.

We repeat, what we have heretofore said, that the case is against the American Naval Stores Company, and that it is impossible to sustain the theory of the prosecution as involved in the indictment, and in the evidence, without convicting the American, and that the acquittal of the American necessarily results, in logic and in reason, in the acquittal of its representatives. In any event, it would be most unjust and unfair to punish officers, who, after all, were nothing more than a part of the machinery of the corporation.

Indeed, the argument for the Government must lead to an absurdity, if we consider that the Government did not attempt to establish the formation of the alleged conspiracy, except by inferences to be drawn from alleged isolated acts of the agents of the corporation itself, which inferences the Jury failed to find sufficient to convict the corporation.

VENUE.

There is no evidence at all of the venue, that is to say that the conspiracy agreement was entered into within the jurisdiction of the Court.

Under the authorities, in the ordinary case of conspiracy, parties can be indicted in the jurisdiction where the conspiracy was formed, or where the overt act was done in pursuance of the conspiracy. But in the case at bar, as we have

a number of times noticed, there is no charge at all of any overt act. The case is confined to the making of an unlawful agreement, and it is alleged, and therefore must be proven, that this agreement (the whole of it) was formed in the Southern District of Georgia and the Eastern Division.

By reference to page 46 it will appear that the fortieth assignments of error excepts to the following charge given by the trial Judge at the conclusion of his charge concerning the venue: "The conspiracy, the venue of this offense will be where the conspiracy was formed; but a conspiracy may be formed by individuals residing in different States or it **may be carried from one district to another**, if the objects and purpose of that conspiracy **has a means for transporting or been committed in another district than that which it was formed.**" The statement as to this charge in the Bill of Exceptions is to be found on page 63, latter part.

The Court ought to have confined the question of venue to the agreement set up. **He ought not to have charged so as to permit the jury to find the venue proven if an overt act was committed within the jurisdiction of the Court, if only because there is no allegation in the indictment to support this theory.** The charge on this subject, while not at all clear, (and we at least have a right to say that we were entitled to an intelligible charge), does permit this. The Court, in no event, ought to have so instructed the jury as to warrant them in finding that the venue was proven, even although the jury were to conclude that no agreement was made within the jurisdiction of the Court.

If an overt act ought to have been alleged, as we claim in the demurrer, then this Indictment is bad, because of the failure to make the averment. If, however, in a case like this, the overt act is no part of the crime, and is not necessary in order to complete the crime, then the charge as to the venue ought to have been confined to the allegation that the completed crime was committed in this district. There is no allegation to support the charge as made.

In the United States vs. Kissel, 218 U. S., 601, the indictment charged a continuing conspiracy, and therefore had an allegation to support this theory. In the case at Bar, we repeat, the alleged specifications are a part of the agreement; as much so as is the purpose to restrain trade, and the only allegation is that this entire agreement was made in the Eastern Division of the Southern District of Georgia.

As to two of the parties convicted (Myers and Moller), there is not a syllable of evidence that they were in this jurisdiction at any time within three years from the date of the finding of the indictment. No party is located in Georgia except in connection with the West, Flynn & Harris Company and the Consolidated Naval Stores contracts heretofore fully noticed. Mr. Boardman was in Savannah in April, 1907; (Page 153 of Record), to attend a meeting.

As held by the Circuit Court of Appeals for the Eighth Circuit, in Vernon vs. United States, 146 Fed., 126 already referred to: "Under this constitutional provision," (referring to the provision which guarantees a trial in the State and District wherein the crime is alleged to have been committed) "the venue is as material as any other allegation in the indictment, and burden to prove it rests upon the Government. Even if it be conceded that there was sufficient evidence to show that there was a bribe, promised or given by Vernon to Blanton, it was error to submit the cause to the jury in the absense of evidence that the offense was committed in that district. While the venue may be proved by circumstantial evidence, a failure to prove the venue is fatal." (The Court here cites authorities in support of this proposition, and then continues) "Even if it was permissible to draw the inference of Vernon's having promised or paid a bribe to Blanton from the statements made by Vernon to Kelley, the inference that the crime was committed in the disriet in which Vernon was tried can only be drawn from the other inference. That presumption cannot be based on pre-suppositions is well settled."

This point was fully made in the argument. As appears by the assignment of errors in the Bill of Exceptions, the Court was asked to instruct the jury to acquit on this ground. The request was overruled, and just before the retirement of the jury, the Court gave the instruction just quoted above.

We may safely say that, whatever other merits this instruction may have, it is not illuminating, and is not such a legal charge as we were entitled to, assuming that the Government could sustain the venue by proof that something was done violative of the statute within the jurisdiction of the Court, although there was no evidence that the unlawful agreement was made within the jurisdiction.

We submit that the evidence fails to prove the venue as laid in the indictment.

THE EVIDENCE CONSIDERED AS TO EACH DEFENDANT CONVICTED.

We ask the attention of the Court to a brief discussion of the evidence with reference to each of the parties convicted.

The discussion hitherto to sustain the contention that the motion to direct a verdict under the facts ought to have been granted bears, of course, upon the question of the guilt of all of the parties, and this question will also be incidentally involved in the discussion of the objections to the charge of the Court.

But we desire now to notice specifically the different Defendants convicted by the verdict.

EDMUND S. NASH.

There is no evidence whatever to justify the conclusion that Mr. Nash was guilty of the offense charged, or of any conduct whatever that was even reprehensible.

In determining whether he was guilty or not, we must do so in the light of the charges as amplified by the Bill of Particulars. Each specification in connection with the Bill of Particulars must be read and the question would then be whether there is any evidence to connect Mr. Nash with the offense specified. If the corporate Defendants were guilty, and had been so found, it would not follow that he was guilty, because no officer of a corporation can be charged with crime on account of what his corporation may have done, unless he be proven to be a particeps criminis, and, in this case, unless it be proven that he himself really "entered into" a contract in restraint of trade, or one to monopolize trade.

The testimony of Mr. Nash is to be found on pages 180 et seq., of the Record. It is full, complete and frank, and must commend itself to the Court. **It is absolutely consistent with every fact proven by the prosecution.** If what Mr. Nash

says be true in substance, there is not only no ground for the charge that he has violated this statute, but there is none to impugn his character or standing as a merchant or as a man, and we must accept his statement as true in the absence of evidence disproving it.

He is not connected by the evidence with anything save the contracts with the West, Flynn & Harris Company and the Consolidated Naval Stores Company, upon which the charge of coercion seems to be based. Save only proof of his official connection with the American Naval Stores Company indicted, there is no effort made to connect him with the case. It is not alled that he was officially connected with the other corporate Defendant. **No witness refers to him, except in connection with these two contracts.** But, we submit, there is absolutely nothing in this evidence to justify condemnation or criticism of any kind. If what Mr. Nash did or sanctioned be unlawful, then no man can safely engage in interstate business, no matter how law-abiding in his purpose and scrupulously honorable he may be.

It is difficult to quote from his testimony without repeating the bulk of it. All of it is important. If the conviction be lawful, it must be because of what he says, and we do not think that the Government will point to a single part of his testimony that is inculpatory, legally or ethically.

As the trial Judge declined to instruct the jury to find in his favor, and submitted the case as to him, submitting as to him nine of the twelve specifications and eliminating only the three abandoned, and has fined him \$3,000.00, just as if guilty, and guilty as charged, this Court will read what Mr. Nash has to say, and we again insist that it is absolutely consistent with every fact proven by the Government, and with every legitimate inference from the facts proven.

SPENCER P. SHOTTER.

We submit that there is no evidence whatever to justify the conclusion of Mr. Shotter's guilt as to the charge made,

or as to wrong doing in connection therewith. His testimony can be found on pages 195 et seq., of the Record.

At the conclusion of his cross-examination, page 209, the Government (very improperly and very unjustly, because such testimony was incompetent) proved by Mr. Shotter's answers that he had been indicted on the 11th day of December, 1899, for an infraction of the interstate commerce law and that, on the 11th day of February, 1907, he plead guilty to a violation of the Anti-Trust Law, and paid his fine.

But the only testimony as to these previous cases comes from Mr. Shotter himself, and in the redirect-examination (pages 209 and 210) his undisputed evidence as to the first case is as follows: "The infraction of the interstate commerce law involved an arrangement between a railroad here and our company whereby we should have the privilege of underbilling to a certain extent. Our office had made the arrangement with a railroad official here; the railroad official would have gotten into trouble if we had defended our position, and we felt that, after all, probably we had made an innocent mistake; it was quite a common thing in those days in merchants to do the same thing; almost all large commercial houses had the same privilege, and it was, in fact, at the time it was arranged, nothing was thought about it; We happened to be unfortunate enough to have this matter drawn out, and I consider that the best way out would be to admit the fact that we were at fault, pay the fine, and assume the blame myself. It was the nature of a special privilege granted to a large shipper; we gave this railroad a large amount of business, and they gave us a consideration for the volume of the business."

He then goes on to explain the facts in regard to the former case under this Legislation, now before the Court. It appears from his testimony that he plead guilty to the violation of the law because of trade agreements. There is nothing in the facts to justify the conclusion that any charge was made in the former indictment to reflect on his character or his good faith. It also appears that before the prosecution

was instituted, and when he did not expect one to be instituted, that he took counsel of Messrs. Hornblower & Byrne, in connection with Mr. Maekall, and the Shotter Company and the Patterson-Downing Company, under their advice, wound up their business, and the stockholders formed the American Naval Stores Company, and had abandoned absolutely the contracts upon which the indictment was afterwards based. Under Mr. Shotter's testimony, the preferring of that indictment was harsh. Certainly there is nothing in the undisputed facts which justified the lugging in of these two former cases, or which will now justify any inference against Mr. Shotter.

Such testimony was as irrelevant as the other fact brought out on cross-examination by the Government, namely, that Mr. Shotter is a Canadian by birth, and is still a British subject. (Page 203 of the Record). The fact that he was a technical alien did not illustrate a single question in the case, or tend to throw the slightest doubt upon any statement that he or any other witness made, or tend in the slightest degree to corroborate any statement. The only possible effect would be to prejudice a jury, and the finding of the jury in this case may well suggest that the tactics may have had some effect upon them.

Mr. Shotter goes fully into all the salient features of the case, shows why his Company preferred the Savannah market to the Jacksonville market, why a concession was asked for as to Jacksonville purchases, and why they desired the naval stores to be stored in the Jacksonville yard. Among other things he says, without dispute (latter part of page 201): "As to at any time being in any scheme or plan of any sort to injure producers and deprive them of a living or ruin their business, I consider myself the largest producer in the United States, and I certainly would not be in any scheme that would be most injurious to myself. I say that I am the largest producer on account of my interests in factorage concerns which are also interested in producing farms. My interest in the American Naval Stores Co., is

about 20 per cent." Again he says (page 202): "My interest as a producer is more than two and one-half and not quite three times as great as my interest as an exporter."

If Mr. Shotter's evidence be true in substance, there is absolutely no reason to criticise him, and his evidence has not only not been disproved, but it is entirely consistent with all of the proven facts.

We repeat there is nothing to show that he or any other officer of the American ever received information, by report or otherwise, to suggest that wrong doing of any kind was done in Brooklyn or in Jacksonville, or anywhere else. His undisputed testimony is to the contrary.

And yet, his sentence is a fine of \$5000, and a sentence of three months in the "common jail of Chatham County." (Page 12.)

J. F. COOPER MYERS.

Mr. Myers was not only convicted, but he was fined \$2,500, and in addition sentenced to a term of three months in jail.

The Government did not attempt to show that he had been connected with any violation of the Anti-Trust Act, or any other.

We submit that there is not a syllable of evidence against Mr. Myers.

The Government abandoned the case against C. J. DeLoach, who did not take the stand. Mr. Myers did not take the stand, and why the case was not abandoned as to him it is difficult to understand. There was no reason for him to take the stand, in view of the entire lack of testimony as to him.

Outside of the evidence of his official connection with the corporations indicted (which is not a crime) his name appears five times only in this entire record.

A witness by the name of Fabian testifies that in the early part of 1905, the witness was employed to go to Fernandina, and then adds: "I was employed, I think, by Mr. Cooper Myers here in Savannah, to go to Jacksonville, and from Jacksonville I was transferred to Fernandina, I think by Mr. Carl Moller." (Page 112.) This witness proved nothing against anybody, and was withdrawn by the Government; but for the sake of entire accuracy, we call attention to this reference. Mr. Davant proves his signature to the letter of S. P. Shotter & Co. (Page 136.)

It appears that he was the addressee of a letter which Mr. Boardman wrote concerning a conversation with Mr. Coachman, and which contained a proposition which Mr. Coachman had made. The letter is to be found on pages 224 and 225 of the Record. There is nothing wrong about the letter. **It does not appear that Mr. Myers ever received it, or that he was responsible for its writing, or that he assented to it, or that he favored it. It only appears that Mr. Boardman wrote him the letter. The uncontradicted evidence is that the Coachman proposition was, in point of fact, turned down.**

His name is mentioned in connection with the letter of the S. P. Shotter Company, dated December 6, 1906, informing the Consolidated Naval Stores Company that the American Naval Stores Company had taken over its contract with the S. P. Shotter Company, and that the Shotter Company had transferred its business to the American. The letter is signed, "S. P. Shotter Company, per J. F. Cooper Myers."

Moller mentions him in connection with his correspondence with the Company, and directions to him (178).

The Record will be scanned in vain for any other reference to Mr. Myers.

It does appear that ordinary business reports were made to the Savannah office, and that Mr. Myers was one of the officers of the Savannah (or West Virginia) American, but **there is absolutely nothing to show that these reports suggested any wrong doing of any kind, even if there was evidence to prove that Mr. Myers saw them. We certainly have**

a right to say, in the absence of evidence, this being the presumption, that they were ordinary business reports, not calculated to raise suspicion in the mind of any one who read them.

There is no suggestion in Moller's evidence that any telegram or communication, from him was outside of regular business communications or was suggestive of wrong of any kind.

Moller's evidence is entirely favorable to the innocence of all the officers of the American and is against the theory of the Government.

GEORGE MEADE BOARDMAN.

Mr. Boardman's name is not mentioned in the Record, except in the testimony of O'Keefe and Coachman, in the advertisement of the American Naval Stores Company, appearing on pages 221 and 222 of the Record, where he is mentioned as treasurer, his letter of February 7, 1908, to Mr. Myers (to be found on page 224 of the Record), and his own testimony as a witness in the case to be found on pages 153 et seq., and the reference to him by Lily (p. 125), when he refers to him as "a man of the very highest character and reputation."

Mr. Boardman testifies, without contradiction, that his principal business is as one of the partners in the Patterson, Boardman & Company, exporters of East India goods in New York City; that while he is treasurer of the American Naval Stores Company of West Virginia, and of the American Naval Stores Company of New York, and is also president of a company in New Jersey that manufactures a butter product, that his time is almost exclusively taken up with the business of Patterson, Boardman & Company, which has no connection with the American Naval Stores Company business; that his company has never had any connection with naval stores; that the New York American pays his salary; that he receives no salary or remuneration from the West

Virginia Company (the Company indicted), except dividends on his stock, he owning a little over three per cent. of its total stock. He also testifies, without dispute, that his salary of \$2,500.00 a year as treasurer is paid by the New York American; that he has no connection with the National Transportation Company of New Jersey (the one indicted) or the National Transportation Company of New York, and never has had; and that he has no office as treasurer of the American Naval Stores Company. He states he had never attended any of the meetings of the stockholders or directors of the West Virginia Company, except on the two occasions mentioned by him—one of them being the meeting when the Company was organized in Jersey City, and another in Savannah in April, 1907. He also testifies, without dispute, **that he has never had any connection whatever with the sale or buying of naval stores; that he never bought or sold any, or made a price on a barrel of naval stores in his life, and never told anyone else to do so.** His testimony is absolute, positive and unqualified as to his having no connection with any matter or thing that justifies or excuses, his conviction. He calls attention to the interviews that Mr. Coachman had in his office at the times mentioned; saying that after the interview in April, 1908, he wrote a letter giving the substance of both interviews, which letter he produces, and, as he explains, it is used "for the purpose of bringing more clearly to my mind what occurred at that interview." This letter he produces himself. He need not have produced it. There is nothing to show that the Government had ever heard of the letter, and it is not reasonable to suppose that he would have produced it had he believed that there was anything inculpatory in the letter.

The letter will be examined in vain for any evidence of Boardman's connection with a conspiracy to restrain trade or a conspiracy to monopolize trade. Coachman is put back on the stand for the purpose of contradicting Boardman. Coachman does deny certain statements in regard to the Toomer Naval Stores, which Mr. Boardman testified Coachman made to him. But all of Coachman's evidence may be

true, and yet it would not warrant the conclusion that Boardman was guilty of the charges made, or had any connection with them.

Both counts of the indictment allege that "The said George Meade Boardman was the treasurer and **one of the chief executive officers** of said company," referring to the American Naval Stores Company of West Virginia. While the proof showed that he was the Treasurer, without salary, of this Company, it also appears by his testimony, without dispute, that he was not one of its chief executive officers; that he was not upon its Executive Committee; that he had no part in the management, or control, or policy of this Company or of its business, his services being connected with financial arrangements in New York City. The connection, therefore, alleged in the indictment was not sustained by the evidence, and the case as to Mr. Boardman failed in this respect, as it does in all other respects.

It is not easy to understand why Mr. Boardman was convicted. Certainly, the Record furnishes no justification or excuse for such conviction.

A motion was made to direct a verdict in his favor, a similar motion being made as to each of the Defendants, and also requests were submitted covering his case and that of each of the Defendants.

CARL MOLLER.

The allegations in both counts of the indictment as to Mr. Moller's connection with any of the Companies mentioned in the indictment or in the evidence is confined to the following statements: "And the said Carl Moller was the Manager of the Jacksonville, Florida, branch, and the agent and employee of said Company," referring to the American Naval Stores Company of West Virginia. And again, "The said Carl Moller was the Manager of the Jacksonville, Florida,

branch of said National Transportation & Terminal Company, and agent and employee thereof."

It appears, without dispute, that he was not an employee of the American Naval Stores Company at all, but he was the Manager of the Jacksonville Yards belonging to the Defendant, the National Transportation & Terminal Company of New Jersey.

He was not even an officer of either Company.

There is no effort made to connect him with anything, except what the Government calls "falsely gauging spirits of turpentine" in Jacksonville. As to Moller, the Government relies upon the testimony of Hoskins. As already noticed, this witness, according to two witnesses, was discharged because he attempted to collect the wages of a co-employee by a forged order, and what he says about Moller is disproved by Moller's testimony, and by that of two other witnesses. He does not claim, however, that Moller was cognizant of what the Government calls "false gauging."

But suppose what Hoskins says be true, and he had connected Moller in a guilty way with what he mentions, how does it appear that Moller was thereby made a party to the conspiracy charged? How unnatural it is that a mere employee would be a party to this conspiracy! He was paid a salary. Of what advantage would it be to go into this conspiracy? His evidence is positive and unqualified that there was no conspiracy, or understanding, or combination of any kind, and that, if any irregularity occurred in the Yards at Jacksonville, which he positively denies (he is corroborated by other witnesses), the officers of the Corporation knew nothing about it, and had nothing to do with it.

As already noticed, his uncontradicted evidence shows that the bulk of the turpentine sold from the Jacksonville Yards was exported abroad, was sold by weight, and not by measurement, and that, therefore, there could be no motive in the fraudulent abstraction of turpentine from the barrels. Such conduct would not add to its selling value, or increase the gains of anyone. If such a thing were done at Jacksonville, this might be used as evidence to show stealing from the Na-

tional Transportation & Terminal Company by one or more of its employees, but it can have no bearing upon this conspiracy charge.

The immediate superior of Hoskins was Woods. Tison was above Woods. (Pages 174 and 177 of the Record.) Moller was above Tison. Hoskins' evidence, even if it shows wrongdoing of any kind does not reach Moller at all.

CHARGE OF THE COURT AND EXCEPTIONS TO THE CHARGE.

The brief of the Government in opposition to the petition for certiorari calls attention to the fact that "for some reason not stated the Record does not contain the full charge of the trial Court."

But the course pursued by us is the proper course. This Court has repeatedly condemned the inclusion of the entire charge (*U. S. vs. Rindskopf*, 105 U. S., 418, 421).

The exceptions are to specified portions of the charge, and the Bill of Exceptions shows that these exceptions were properly taken, and the correctness and accuracy of their statements are fully certified to in the Bill of Exceptions.

There is no suggestion in the Record that the errors embraced in the exceptions were corrected or modified in any way. The presumption is that the trial Judge would have had such modifications noted if they were made in any way.

Even if our objections were not raised in the proper manner (and so far as we can discover they were carefully and technically made), the rule of the United States Courts is, because of the anxiety of the Courts to see to it that parties are fairly and legally tried that "in criminal cases the Courts are not as exacting in regard to the character of the objections as in civil cases, and will notice error in the trial of a criminal case although the question may not have been raised in exactly the proper manner at the trial." (*Crawford vs. United States*, 212 U. S. 183.)

A charge unsustained by the evidence is serious and reversible error.

As said in *United States vs. Breitling*, 20 Howard 254 (latter part of page): "It is clearly error in a Court to charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically as-

sumed in the opinion of the Court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but it has a tendency to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."

In *Hicks vs. United States*, 150 U. S. 442, the Court submitted to the jury the point as to the presence of the defendant for the purpose of aiding or abetting in the shooting charged against another party. The language of the Court, on page 450, is apposite to the case at bar, when the Court says: "The evidence, so far as we are permitted to notice it, as contained in the bills of exception and set forth in the charge, shows no facts from which the jury could have properly found that the rencounter was the result of any previous conspiracy or arrangement. The jury might well, therefore, have thought that they were following the Court's instructions in finding the accused guilty, because he was present at the time and place of the murder, although he contributed neither by word nor action to the crime, and although there was no substantial evidence of any conspiracy or proof arrangement between him and Rowe."

In *Ward vs. United States*, 14 Wallace 29, the Court holds: "It is error by the Court in such case to charge the jury that they may find such a verbal proposition when there is nothing but mere suspicion upon which they can do so."

A cardinal error in the charge is to be found in instructions which permit the jury to infer the conspiracy charged as to all or any of the Defendants (save DeLoach), if it were shown that any one of the means as set up in the indictment, except the three eliminated, was used.

We mention again the statements on pages 42 and 43, of the Record, at the end of the 30th assignment of error, in these words: "The Court withdrew from the consideration of the jury only three of the twelve specifications—the three withdrawn being those as to false statements, the issuance and circulation and hypothecation of fraudulent warehouse

receipts, and the alleged bribery of employes of competitors. The Court submitted all the other specifications."

By reference to page 43, the following statement will appear at the end of assignment No. 33: "The Court added to this portion of the charge the following: 'No evidence as to three of the means has been offered, and you should not consider them. Those are the charges of circulating and publishing false statements, charging the issuing and causing to be circulated and hypothecated fraudulent warehouse receipts, and the charge of attempting to bribe employes of competitors and factors to obtain certain information. Those are the means and matters alleged in the indictment on which there has been no testimony.'"

The various assignments of error except specifically to the submission of the different specifications submitted, nine of them upon the ground that they were unwarranted by the evidence, etc.

These statements and all others in the assignment of error are fully certified to by the Court in the Bill of Exceptions.

By reference to page 44 of the Record (35th assignment), it will appear that the Court charged that "It is not necessary for the Government to prove that all the means charged were in effect a part of a single purpose and conspiracy, by two or more of the Defendants, or that all of the means charged were in fact carried out by two or more of the Defendants. It is sufficient if it be shown beyond a reasonable doubt that some of the means, which were a part of the common scheme," etc., and immediately after this, same page (36th assignment of error), the Court charged "If you should find under these principles laid down, **that any of the alleged means** were employed, and that the necessary effect of those means was to restrain interstate and foreign commerce," etc.

Several of the specifications seem to endeavor to make capital out of what, if true, would be the ordinary tactics of traders, always supposed to be entirely allowable and proper. One of them amounts to no more than that the American Naval Stores Company, when it suited its purposes, went into the

market, and, when it suited its purposes, kept out of the market. Another, as amplified by the Bill of Particulars, is that naval stores receipts were forced from Florida points and Brunswick to the port of Savannah, and thus diverted. Another is based upon the allegation of the coercion of two companies into entering into contracts. **Under the Court's charge, the jury might have convicted these Defendants under the idea that they did any one of these things, and did not do the others.**

Under all the principles of logic, the attitude of the Government is remarkable. It offers no evidence at all of conspiracy, except the alleged use of the means by which the indictment charges the conspiracy was to be effected, and some of these means at least are perfectly innocent in themselves, and the Government must therefore claim that they constituted a crime because of the existence of the conspiracy and their use in pursuance of the conspiracy. As already noticed, it argues in a circle, and the argument is: **"The conspiracy is proven by the means, and the means are proven to be unlawful because they are the result of the conspiracy."** This is the logical result, although not, of course, the language of the Government's attorneys.

If the instructions to the jury be sound, then an indictment would be good which charged, in effect, that Defendants were guilty of a conspiracy (using the general terms of the statute), and, because, in their effort to get as much trade as they could, they diverted business that would ordinarily have gone to Florida ports, to Savannah.

The indictment would be good if it averred as the sole evidence of guilt the fact that the Defendant sometimes went into the markets and sometimes stayed out of the markets. It would be good, under the views given to the jury, if the case and the evidence were based upon the use of any of the means set forth in the indictment.

No charge as to Coercion should have been submitted.

By reference to page 40 (assignment No. 21) and page 56, (Bill of Exceptions), it will appear that the Court refused to

give to the jury the instruction mentioned, covering this point, and, by reference to page 44, (assignment 34), and to page 61 (Bill of Exceptions) it will appear that the Court charged the jury just as if there was evidence to prove this feature of the case in its entirety, and exactly as stated in the indictment. It will also appear that before the jury retired exceptions were duly taken as to this and all other matters covered by the assignments of error.

As already contended, there is not a syllable of evidence to show coercion in any legal or other sense. The contracts upon which this charge is based are to be found on pages 219 and 220. The West, Flynn & Harris contract was made with the American. The other contract, that with the Consolidated Naval Stores Company, was made before the birth of the American. The American is not a party to it, and under no view can it be said that it **coerced** anyone into **entering into** the contract. These contracts on their face seem to be lawful and proper. We find no feature in them that could fairly or reasonably be said to be in any wise inimical to this law. We again call attention to the significant fact appearing on page 220 of the Record, that before the American Naval Stores Company would assume the contract with the Consolidated Naval Stores Company, it required the elimination of the tenth and eleventh paragraphs, which are set out on this page, and which might have "smacked" of an effort to restrain trade. The Government's own evidence, therefore, instead of sustaining their theory, as to these contracts, disproves their charge.

Without repeating them we ask the attention of the Court to the assignments of error, based upon the charge as given, and the refusal of a number of requests to charge.

The point as to venue is embraced in the 13th and 14th assignments of error, which except to the refusal of the Court to charge as requested touching proof of venue, and in the 40th assignment, concerning the charge actually delivered as the jury was about to retire.

We repeat two objections to this charge. One is that the jury was not confined to the allegation that the unlawful agree-

ment was made in the jurisdiction of the Court, and were allowed to sustain the venue if they found that the conspiracy charged was "carried" from one district to another, or "if the objects and purposes of that conspiracy has a means for transporting or been committed in another district than that in which it was formed," the objection being that there was no allegation to support this theory, and the other is that in any event we were entitled to a legal and an intelligible charge on the subject of venue.

Without elaborating it, we submit that the 15th assignment of error is well taken.

The 16th and 24th assignments of error both deal with the refusal of the Court to charge as requested, concerning the case of the Lily Varnish Company, which is based upon the specification in the indictment as to inducing customers by payment of bonuses and threats of boycott, to postpone dates of delivery of contract supplies. **We have already shown that this specification rests upon the testimony of Mr. Lily alone. His testimony does not refer to a boycott, or bonuses, or threats.** It proves that there was a delay in receiving a car of turpentine, due to the pressure of business on the part of the railroads, and that an allowance was made for this and settled. The Courts certainly should have eliminated this specification. While the Court gave the request as submitted it added words that submitted the entire specification to the jury, and, as the Court has certified that it submitted every specification, as amplified by the Bill of Particulars, save only the three eliminated.

We submit that the requests to charge, covered by the 18th, 19th, 20th, 21st, 22nd, 23rd, 24th and 25th assignments of error (pages 39 et seq., of the Record) ought all of them to have been given.

They called attention to an utter failure of evidence to sustain the specifications noticed, and the correctness of their statements is amply vindicated by the Record.

The 21st assignment deals with the West, Flynn & Harris and the Consolidated Naval Stores Company contracts.

The 22nd assignment deals with the 7th specification as to falsely and fraudulently raising the grades of rosin without re-inspection, detailing the places at which the specification, amplified by the Bill of Exceptions, alleges this practice was done. It asks the Court to charge that there has been no effort to show anything of the kind, except as to the yards in Brooklyn, New York. This is absolutely true in point of fact. It also asks the Court to charge that there was no evidence to sustain the allegation that what was done was done under the direction of the respective managers of the companies indicted, and by the employes of these companies. The undisputed evidence shows that this allegation was entirely unsustained, and on the contrary disproven, and yet the Court submitted the entire specification, as amplified by the Bill of Exceptions, just as if the evidence had sustained it.

The 23rd assignment relates to the charge of "false gauging," and asks the Court to charge that this specification had not been substantiated, and to instruct the jury "that the taking out of spirits from a barrel, after it has been gauged, whether this was properly or improperly done, would not sustain such a charge. When the Government makes a charge it must prove it strictly as made."

We submit that the request to charge covered by the 26th, 28th and 30th assignments of error (page 42 of the Record), ought to have been given as submitted, without qualification. They speak for themselves, and the attention of the Court is asked to them. Elaboration would not be helpful.

The 31st assignment complains that the Court submitted all of the specifications mentioned in the indictment, save only the three withdrawn, those three being those stated in the preceding assignment.

The 32nd assignment complains of the instruction there stated. The charge complained of is entirely too broad and is not sustained by the allegations in the indictment, or the proof.

We respectfully insist upon all of the succeeding assignments of error, objecting to the charge of the Court as stated. They explain themselves.

We submit a general contention, which will apply to a number of the exceptions to the charge of the Court, to the Motion to Direct a Verdict, and objections to the evidence, and that is that the matters and things referred to in the specifications have no reference at all to the Congressional legislation involved in this prosecution, and no bearing upon this legislation, and for this reason, if for no other, ought not to have been submitted to the jury.

The Court treated the case just as if overt acts had been charged and proven. The Government claimed to offer evidence to show that certain things were done upon the idea that it might be inferred from the doing of them that the conspiracy agreement was entered into. In defining an overt act, with reference to treason, Bouvier, in his Law Dictionary, says: "An overt act in treason is proof of the intention of the traitor, because it opens his designs; without an overt act treason cannot be committed. An overt act, then, is one which manifests the intention of the traitor to commit treason." (2 Bouviers' Law Dictionary, Title "Overt"). In Archbold's Criminal Practice and Pleading (8th Edition by Pomeroy, Vol. 2, pages 1843-4, Star Page 620), it is said: "Every overt act, to be evidence, must have at least a tendency to prove either the general nature of the conspiracy, or that one or more of the defendants were operating towards effecting that which is charged in the indictment as being the object of the conspiracy."

If this be true where overt acts are charged, a fortiori it must be true where no overt act is charged, and the theory is

that the acts referred to were simply within the contemplation and purpose of the parties.

If Defendants had been guilty of the fraudulent practices which the indictment charges were a part of the conspiracy agreement, there would be nothing in them to restrain trade or to monopolize trade; there is nothing in them to prove the general nature of the conspiracy, or that the Defendants, if guilty of them, would be "operating towards effecting that which is charged in the indictment as being the object of the conspiracy." If a trader uses false weights and measures, or puts sand in his sugar, or practices any other form of deception and fraud, there would be nothing in this to restrain or monopolize trade. While out of the particular transaction the trader might make a little more money, yet such practices would repel trade and destroy confidence, and would decrease instead of increase his business.

We insisted in the argument in the trial Court, and raised the contention by objections to the evidence, motion to direct a verdict, requests to charge, and exceptions to the charge as given, that no case was involved in the Governments' theory.

It is the naked bald case of a trader, lawfully incorporated, no attack being made upon the lawfulness or good faith of the incorporation, acquiring a large business, and the Government claiming that this business was acquired by reprehensible practices, and that, therefore, this trader has violated the Anti-Trust Law, although no combination with any other trader and no "Trust" of any kind is shown.

The Government's case also involves the contention that this trader entered into a conspiracy agreement through its officers and also with its officers; what we submit is tantamount to claiming that it conspired with itself. The verdict in effect acquits the trader entirely, finds that it did not conspire through its officers, and, therefore, finds against the Government's theory.

RULINGS AS TO EVIDENCE.

Assignments of error, 41 et seq., to be found on pages 46 et seq., of the Record, are all respectfully submitted. They are involved in the discussion with reference to the motion to direct a verdict, the sufficiency of the evidence, and exceptions to the charge.

CONCLUSION.

We respectfully submit, in conclusion, that there is no case stated in the indictment, and none in the evidence.

Even if the conviction of these Plaintiffs in Error was warranted, which we earnestly deny, this Court will not let the conviction stand unless it be a lawful conviction.

Certainly the Record has errors which are material. The rule adopted by this Court and several times stated, is thus expressed in *Deery vs. Cray*, 5 Wall. 807, (latter part of page): "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. **But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.**" The ruling is repeated with the quotation of these words in *Gilmer vs. Higley*, 110 U. S. 50.

In a court of law there are always two questions, namely, Is a party guilty, and has he been lawfully convicted?

In the case of *Clyatt vs. United States*, 197 U. S. 222, this Court was compelled to so construe the law as to discharge a Defendant guilty in the opinion of the Court of great wrong, and richly deserving the blow of justice, but the Court found that it could not stretch the law to reach the case, and it observes: "Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained." In the case at bar we earnestly insist that the law is invoked in behalf of Defend-

ants, against whom there is no real evidence whatever of guilt, legal or ethical.

In the case of *Favor vs. The State*, 54 Ga. 249, two defendants were tried, and the jury brought in a verdict finding "the prisoner at the bar guilty," and one of the objections to the verdict was that it did not specify which of the two defendants at the bar was found guilty, and it was thus indefinite and uncertain. The Court, through Chief Justice Warner, (a great lawyer, a great judge, and a great citizen), sustained this objection to the verdict, and said, among other things, on page 250: "The judgment of a court, depriving a human being of his or her life upon such a record as is here presented, cannot be sustained by this court or any other court where life and property are protected by law. When the State seeks to deprive the citizen of his or her life and liberty, the record of his or her conviction must affirmatively show on the face thereof, that it has been in accordance with the laws of the land." It is true that the Court was dealing with a capital offense, but the principle announced applies to every criminal case where the prosecution seeks to fix crime upon a citizen and to deprive him of money, property or liberty. In the case at bar it applies particularly to the two Plaintiffs in Error, who are under jail sentences.

At the conclusion of the opinion in *U. S. vs. Brewer*, 139 U. S. 288, this Court, through Mr. Justice Blatchford, not only holds that "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid" but also **"before a man can be punished his case must be plainly and unmistakably within the statute."**

Can it be said that the case of these Plaintiffs in Error is **"plainly and unmistakably"** within the statute invoked by the Government, and that they have been lawfully convicted without material error in the trial, and by a lawful and complete verdict?

Respectfully submitted,

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

EDMUND S. NASH ET AL., PETITIONERS,	}	No. 197.
v.		
THE UNITED STATES, RESPONDENT.		

REPLY BRIEF ON BEHALF OF THE UNITED STATES.

I.

The demurrer was properly overruled by the trial court as to the first and second counts of the indictment.

The several grounds of objection urged by petitioners will be considered in the order presented in the brief filed by Mr. Adams.

1. *The act of July 2, 1890 (26 Stat., 209, ch. 647), known as the antitrust law, is valid as a penal statute.*

The first two counts of the indictment are based on section 1 of the act, which reads as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any

such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The substance of counsels' contention is that this statute was construed by this court in the case of *Standard Oil Company v. United States* to mean that every contract, etc., which *unreasonably* restrains interstate or foreign trade or commerce is unlawful, and that the statute as so interpreted does not describe the offense with sufficient certainty, but leaves it within the arbitrary discretion of the jury to determine what conspiracies are reasonable and what unreasonable. Having thus modified the statute they cite as authorities the case of *Chicago & Northwestern Ry. Company v. Dey* (35 Fed., 875, 876), in which Judge, subsequently Mr. Justice Brewer, expressed the opinion that a statute which prohibits a railroad company from charging an *unreasonable* rate is void as a penal statute for uncertainty; and *Tozer v. United States* (52 Fed., 917), where the same learned judge held that the undue preference clause of the interstate-commerce act can not be sustained as a criminal provision because the offense is made to depend on whether the jury think a preference reasonable or unreasonable; and also the case of *Louisville & Nashville R. R. Co. v. Commonwealth* (99 Kentucky, 132), wherein it was held that the pro-

vision of a Kentucky law which prohibited railroads from charging more than a reasonable rate was not enforceable as a criminal statute for uncertainty. Other cases which bear but remotely upon the proposition are also cited, but need not be reviewed.

In the first place, counsel do not correctly interpret the decision of this court in *Standard Oil Co. v. United States* (221 U. S., 1). It is true that in the opinion handed down by Mr. Chief Justice White the words "reasonable" and "unreasonable" appear in connection with restraint of trade, but it is equally true that the court *defined precisely what was meant by the use of these terms*. After a full discussion of the English law upon this subject and also a review of the authorities in this country, the court summarized its conclusions as follows (p. 58):

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, *but, on*

the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

When this decision was handed down it was generally stated in the press that the court had interpreted the statute as prohibiting only unreasonable restraints of trade, but that no doubt might exist as to the meaning expressed by the court, and to make it perfectly clear that it was not intended to read such expression into the statute, in the opinion shortly thereafter delivered in *United States v. American Tobacco Co.* (221 U. S., 106, 179) the court said:

Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the antitrust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It

was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. *In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term "restraint of trade" required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.*

Hence, instead of injecting an element of uncertainty into the statute, the court has pointed out clearly its meaning; and there is not submitted to the jury the question what constitutes an unreasonable restraint of trade, or whether the evidence introduced proves an unreasonable restraint, but the question submitted is, Whether the evidence shows a conspiracy to restrain trade within the meaning clearly defined by the court? Therefore the statute is no more subject to this criticism than other statutes which define offenses that may be proven by different sets of facts.

The case of *Waters-Pierce Oil Co. v. Texas* (212 U. S., 86, 108) should be taken as conclusive of this question. It was there insisted that the antitrust

law of Texas denouncing as unlawful contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc., and another statute prohibiting acts which "tend" to accomplish prohibitive results was contrary to the fourteenth amendment of the Constitution on account of its vagueness and uncertainty, but this court mainly upon its previous decisions sustaining the Sherman Act overruled this contention and sustained the validity of those provisions.

This statute has been repeatedly before this court in civil cases and attacked by the ablest lawyers in the United States, but its validity has been as often sustained, and many conspiracies have been declared violative, of its provisions and their continuation enjoined. There is no difference between a conspiracy that may be enjoined and one that subjects the conspirators to the penalties specified in the first and second sections. Furthermore, the fifth amendment protects one's property equally with his liberty, and hence if valid in a civil action it is equally valid as a criminal statute. Moreover, *United States v. Kissel* (218 U. S., 601) was a criminal action, and the defendants therein were represented by lawyers of national reputation, but it does not appear that the validity of the act as a penal statute was even attacked either in the court below or in this court.

This question was perhaps more fully considered than elsewhere by Judge Hollister in passing upon the demurrer in the case of *United States v. John H. Patterson et al.* (National Cash Register case), which

opinion has been printed by the United States, and copies thereof are handed to the court herewith. All the authorities bearing upon the question are there fully considered.

2. *The indictment is not defective because it fails to allege an overt act.*

This statute, unlike section 5440, Revised Statutes, does not require the commission of an overt act as a prerequisite to prosecution; and it is a rule universally recognized by the authorities that where the statute does not contain such a requirement it is unnecessary to set forth in the indictment any overt act. (Archbold's Criminal Pleading, Evidence, and Practice, 1215 (24th ed.); 2 Bishop's New Criminal Procedure, sec. 205 (4th ed.); *State v. Straw*, 42 N. H., 393, 394; *Commonwealth v. Judd*, 2 Mass., 329, 336; *Commonwealth v. Shedd*, 61 Cush., 514, 516; *Commonwealth v. Fuller*, 132 Mass., 563, 566, 567; *People v. Richards*, 1 Mich., 216, 224; *People v. Dyer*, 79 Mich., 480, 481; *State v. Keach*, 40 Vt., 118.)

Section 5440, Revised Statutes, specifically requires the commission of an overt act before prosecution, hence the decisions under that section here have no application. It is suggested by counsel that because that section does require an overt act, it should be taken as a legislative policy that for the prosecution of all kinds of conspiracies such act is essential. But the inference is clearly to the contrary. Congress has passed two conspiracy statutes, in one of which there is a departure from the common-law rule plainly expressed on its face, while the other

expresses no such departure; and hence the presumption is that none was intended.

3. *The indictment is not defective because it fails to charge that the trader mentioned had any combination, alliance, or agreement of any kind with any other trader, or because no conspiracy is stated therein or because it does not allege that the individual defendants were traders.*

The second, third, and fourth grounds of attack upon the indictment—pages 51, 61, and 65 of Mr. Adams's brief—will be here considered together.

There is certainly nothing in the statute which remotely implies that it is necessary for one or more of the conspirators to be engaged in the particular class of commerce which it is alleged it was the object of the conspiracy to restrain, and no decision can be found which has so construed the statute. In this indictment, after particularly describing the character of commerce carried on by the defendant, American Naval Stores Co., the indictment alleges that the several defendants, naming both corporations and individuals separately, conspired "to restrain trade and commerce among the several States of the United States and with foreign nations in the aforesaid articles of commerce between the several States and foreign nations, to wit: Spirits of turpentine, rosin, and the products of pine forests and turpentine farms, commonly called naval stores, the said restraint of trade and commerce among the several States and foreign nations to be effected, amongst other ways, as follows." Then follows a description of the means

by which the restraint was to be brought about. It is true that the indictment in describing the several individual defendants states their relationship with the defendant corporations, but it does not allege that when so conspiring they were acting in their official capacity; *but to the contrary specifically alleges that each of them was personally a party to the conspiracy.* Obviously, if a trader carrying on interstate commerce should enter into an agreement with a number of individuals, none of whom are traders, to destroy by methods agreed upon the business of his competitors and for the trader thus to acquire a monopoly of such line of business, such a combination would be just as effective, and be as clearly denounced by the provisions of the statute, as if each of the individuals were traders. *Loewe v. Lawlor* (208 U. S., 274) is conclusive of this question. There a manufacturer whose goods were sold in several States refused to unionize his shop, on account of which a boycott was instituted by certain labor unions for the purpose of injuring his business to such an extent as to force him to comply with their demands, and it was held that—

A combination may be in restraint of interstate trade and within the meaning of the anti trust act although the persons exercising the restraint may not themselves be engaged in interstate trade, and some of the means employed may be acts within a State and individually beyond the scope of Federal authority, and operate to destroy intrastate trade as (well as) interstate trade, but the acts must be

considered as a whole, and if the purposes are to prevent interstate transportation the plan is open to condemnation under the antitrust act of July 2, 1890.

There neither of the conspirators were traders, and certainly the rule can not be different where one of them is a trader while the others are not. Though that was a civil action to recover damages under the seventh section of the act, yet the same construction must be given to the act in both civil and criminal cases. (*U. S. v. Keitel*, 211 U. S., 370, 392.)

The fact that the individual defendants are officers of the corporations which were jointly indicted, but against which no verdict was returned can not exonerate them from criminal liability. It is true that a corporation may be jointly liable for a conspiracy. (8 Cyc., p. 657.) But it does not follow that its several officers who participate in the formation and carrying out of the conspiracy are not liable, though it may have been entered into for the benefit of the corporation. This statute denounces every agreement and conspiracy of the kind described as unlawful; and hence when any individual gives his assent thereto and engages therein he is committing an unlawful act, and can not be shielded therefrom by imputing such act to the corporation. If the affairs of a corporation were dominated absolutely by one individual who, acting independently and without agreement with another individual, should commit acts in restraint of interstate commerce, it might be conceded that no conspiracy there would exist, though the

corporation itself should receive the benefits arising from such acts. In such case there would be no meeting of minds; and in that sense there can not be a conspiracy between a corporation and one of its officers. But where a number of individual officers of a corporation agree or conspire among themselves to pursue a certain course of action in restraint of interstate commerce there is a meeting of minds, and the conspiracy is complete regardless of whether such officers are benefited directly or indirectly through the corporation by the restraints thereby imposed upon the business of competitors. It is unnecessary to here consider under what circumstances the action of the officers may be imputed to the corporation, as in this case no judgment is pronounced against the corporations.

In fact, in many cases brought under the Sherman Act the agreements and conspiracies attacked have been entered into by officers and agents of corporations, as in the case against John H. Patterson et al., where the defendants were acting for the benefit of the National Cash Register Co.; in the case of *United States v. United Shoe Machinery Company et al.*, one count of which was sustained by Judge Putnam, wherein the several individuals were acting for the company; and in the case of *United States v. Kissel et al.*, where the conspiracy was by officers and agents of the American Sugar Refining Co. to obtain control of a competitor. So, in civil cases brought under the act, the officers are ordinarily made defendants in

order to inhibit them from personally carrying out the unlawful agreements.

The case of *United States v. Whitwell* (125 Fed., 454, 460), if good authority, is not in conflict with this contention. There it was not decided that an employer could not conspire with an employee or agent to restrain interstate commerce. But in so far as the court there placed its decision upon the ground that the alleged agreement upon which the action was based was not violative of the law, because the two parties entering into it were not competitors, and hence the trade of neither of them was restrained by virtue of the contract, the opinion is clearly not in accord with the many decisions of this court, because it is well settled that it is not necessary that the object of the contract be to restrain the commerce of one or more of the contracting parties in order to render the conspiracy unlawful.

4. *The indictment is not fatally defective because too vague and indefinite.*

After the demurrer to the first and second counts had been overruled, defendants moved for a bill of particulars, which motion was allowed, and such bill was submitted by the United States. A description of the indictment as thus supplemented is as follows:

The first count charges that the defendants, with divers other persons unknown to the grand jurors, unlawfully combined, conspired, confederated, and agreed together to *restrain trade* and commerce among the several States and with foreign nations in spirits of turpentine and rosin, commonly called

naval stores (pp. 1, 3). The second count, after stating that defendants had already secured to themselves more than half of the interstate and foreign trade and commerce in naval stores, charges that the defendants did unlawfully combine, conspire, confederate, and agree together amongst themselves and with divers other persons to the grand jurors unknown *to further monopolize trade and commerce, interstate and foreign, in said articles "said monopolizing to be effected amongst other ways as follows"* (p. 6). The pleader then enumerates the twelve ways, which are identical in the two counts, and read as follows:

1. By controlling, manipulating, and arbitrarily bidding down and depressing the market and market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices. (Rec., p. 6.)

The bill of particulars (p. 27) specified the places or markets where the Government expected to show that this manipulation of market prices was done, the names of competitors affected by the manipulation, and the names of the persons by whom it was done, namely, the defendants and certain of their agents. (Rec., p. 27.)

2. By coercing and causing naval stores receipts, which would normally and naturally flow to one port of the United States, to be diverted to another port of the United States. (Rec., pp. 3, 6.)

The bill of particulars names the ports respecting which this proof was to be given, saying:

The Government expects to prove that the diversion of naval stores receipts * * * was forced and coerced from the ports of Fernandina and Jacksonville, Fla., and Brunswick, Ga., to the port of Savannah, Ga., and that this was done by the defendants themselves. * * * (Rec., p. 27.)

3. By purchasing thereafter at divers times a large part of its supplies at naval-stores ports known as closed ports and willfully and with the deliberate intent and purpose of depressing the market refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market, where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basic or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport, and Mobile on a basis of the market at Savannah. (Rec., pp. 3, 6.)

No further specification was required respecting this averment, for the allegation was specific. The market price of naval stores—that is, turpentine and rosin—is fixed throughout the United States by what is the market price at Savannah, which is the only primary or open ports in the United States. All other ports and markets are closed ports, where prices are made on the basis of the closing market at

Savannah, with appropriate differentials to cover freight and traffic charges; that is to say, the prices at Pensacola, Tampa, Fernandina, Gulfport, and Mobile are governed by the price prevailing at Savannah, which is the basic market or port. Having in mind this fact and the averment (Rec., p. 6) that the defendants had already secured to themselves more than half of the interstate and foreign trade and commerce in naval stores, the significance of the above allegation of the indictment as a means of acquiring a further monopoly becomes apparent.

4. By coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into. (Rec., pp. 3, 6.)

The bill of particulars specifies the names of certain factors and brokers respecting whom this proof was to be given by the Government at the trial. (Rec., p. 27.)

5. By circulating and publishing false statements as to naval-stores production and stocks in hands of producers and their immediate representatives. (Rec., pp. 3, 4, 28.)

The trial court in its charge to the jury eliminated from their consideration this averment, stating that no evidence had been offered in support of it. (See Rec., pp. 42 and 43.)

6. By issuing and causing to be circulated and hypothecated fraudulent warehouse receipts. (Rec., pp. 3, 6, 28.)

The trial court also withdrew this specification from the consideration of the jury. (Rec., pp. 42 and 43.)

7. By fraudulently grading, regrading, and raising grades of rosins and falsely gauging spirits of turpentine. (Rec., pp. 3, 6.)

The bill of particulars specifies the places at which and dates on which the Government expected to prove that the practice of falsely and fraudulently raising the grades of rosin was carried on. (Rec., p. 28.)

8. By attempting to bribe employees of competitors and factors so as to obtain information as to competitors' business and stocks. (Rec., pp. 4, 6, 28.)

The trial court withdrew this specification from the consideration of the jury on the ground that no evidence had been offered to substantiate it. (Rec., pp. 42 and 43.)

9. By inducing consumers by payment of bonuses and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices. (Rec., pp. 4, 7.)

In the bill of particulars the Government named the persons to whom it expected to show bonuses were paid by the defendants in order to force the postponement of deliveries, and it also named the persons threatened with boycott. (Rec., p. 29.)

10. By making tentative offers of large quantities of naval stores under prevailing

markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers. (Rec., pp. 4, 7.)

The bill of particulars names the persons to whom tentative offers were made and respecting whom proof was given by the Government at the trial. (Rec., p. 29.)

11. By at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors. (Rec., pp. 4, 7.)

For the specifications of the bill of particulars, see record, page 30.

12. By willfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production. (Rec., pp. 4, 7.)

The specification of the bill of particulars respecting averments 11 and 12 reads as follows (Rec., p. 30):

Eleventh and twelfth: Under the eleventh and twelfth specifications in the order of the court the Government expects to prove that in the months of November and December, 1907, the American Naval Stores Co. at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by the manager of the New

York City office of the American Naval Stores Co. and at Philadelphia, Pa., by the managers of the Philadelphia branch office of the American Naval Stores Co., and divers other sales made at divers other places and on divers other times to consumers and by representatives of the American Naval Stores Co. at this time to the assistant United States attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market at those times depressed below the cost of production by the defendants by the various means and in the manner specified in the first and second counts of the indictment.

After the enumeration of the 12 ways and means by which the defendants were to restrain trade (count 1) and to monopolize that trade (count 2) the pleader stated the intent with which the acts were done in a general allegation as follows, count 1, page 4:

Each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such trade and commerce among the several States and foreign nations in the aforesaid articles of commerce, and destroying competition and restraining trade in the aforesaid articles of commerce.

And count 2, page 7:

Each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing

competitors from engaging in such trade and commerce among the several States and foreign nations in the aforesaid articles of commerce, and destroying competition and monopolizing trade in the aforesaid articles of commerce.

This allegation of intent applies to each of the 12 means enumerated above; that is to say, the pleader charges that in doing each of the acts above specified the defendants were animated with the intent contained in this general allegation, inserted after the enumeration of the 12 means.

In view of the specific allegations contained in the indictment, how can the defendants assert that the indictment was not sufficiently definite to enable them to make their defense? The indictment advised them clearly of the nature and cause of the accusation against them. The most rigorous requirements of criminal pleading were carefully observed. *Armour Packing Co. v. United States* (209 U. S., 56, p. 83).

There can be no question that these allegations, if proved, are sufficient in law to support a conviction. The acts must be considered as a whole, and as governed by the intent alleged in the indictment to crush competitors, destroy competition, and monopolize trade. In the *Swift case* (196 U. S., 375) Mr. Justice Holmes said (p. 396):

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, what-

ever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference; but they are bound together as parts of a single plan. The plan may make the parts unlawful.

In *Aikens v. Wisconsin* (195 U. S., 206) Mr. Justice Holmes said:

No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

And in *Loewe v. Lawlor* (208 U. S.) the late Chief Justice Fuller said, on page 301:

So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out.

In Archbold's Criminal Pleading, Evidence and Practice (24th ed., p. 1416), it is said:

The indictment must in the first place charge the conspiracy. And in stating the

object of the conspiracy, the same certainty is not required as in an indictment for the offense, etc., conspired to be committed; as, for instance, an indictment for conspiring to defraud a person of "divers goods" has been held sufficient. (*Ante*, p. 62; and see *R. v. Rispal*, 3 Burr, 1320; 1 W. Bl., 368; *R. v. Blake*, 6 Q. B., 126; 13 L. J. (M. C.), 131; *Sydserrff v. R.*, 11 Q. B., 245.) So, an indictment charging a conspiracy "by divers false pretenses and indirect means to cheat and defraud A. of his moneys" was held good (*R. v. Gompertz*, 9 Q. B., 824; 16 L. (Q. B.), 121; 2 Cox, 145; *R. v. Gill*, 2 B. & Ald., 204; *Aspinall v. R.*, 2 Q. B. D., 48, 60); and it is not necessary, in order to sustain such an indictment, to prove such a false pretense as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretenses. (*R. v. Hudson*, Bell, 263; 29 L. J. (M. C.), 145; 8 Cox, 305.) But a conspiracy to defraud the creditors of W. E. (not saying of what) is too general. (*R. v. Fowle*, 4 C. & P., 592.) In an indictment for a conspiracy at common law, to effect objects prohibited by a statute, it is sufficient to follow the words of the statute. Therefore, an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages, etc., by "molesting," by "threats," by "intimidating," by "obstructing," etc., in violation of 6 G. 4, c. 129 (rep.), was held sufficient, as it followed the words of the statute though it

did not set out the means used to molest, intimidate, or obstruct, or the threats held out. (*R. v. Rowlands*, 17 Q. B., 671; 2 Den., 364; 21 L. J. (M. C.), 81.)

What additional facts could the pleader in the present case have alleged? It was his duty to describe the offense committed, which consisted of the entering into of a certain conspiracy, and not the engaging in such conspiracy, that under the statute being made a separate offense. Hence, he was required to incorporate in the indictment the understanding or agreement between the parties, *which embraced only the general course of conduct it was intended to pursue, and not the individual acts which were subsequently committed, because such acts were not then in the parties' minds, and were committed as mere incidents to carrying into effect the plan agreed upon.*

II.

The verdict of the jury sustains the judgments pronounced thereon, though it does not mention the defendant corporations.

The jury returned a written verdict as follows:

We, the jury, find the defendants Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, Carl Moller, George Meade Boardman guilty on first and second counts, and C. J. De Loach not guilty. So say we all. E. P. Noyes, foreman. (Rec., p. 10.)

It is insisted that this verdict is a nullity, because no report whatever is made as to the defendant cor-

porations; and it is attempted to sustain this contention on general principles, and especially under section 1036, Revised Statutes, which reads as follows:

On an indictment against several, if the jury can not agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

The contention is that the clause "if the jury can not agree upon a verdict as to all" implies that an attempt and failure to agree as to each of the defendants is a necessary prerequisite to the returning of a verdict by the jury as to either of them, and, further, that the report of the jury must show that such disagreement was had.

This section should not be given such a highly technical construction. The statute does not require that any report shall be made by the jury as to the parties about which they disagree; and in the absence of such a report it should be presumed that the jury did its full duty and considered the evidence as to every defendant, and reported only as to those with reference to whom they could agree. It is not required that any entry shall be made as to those about whom there was a disagreement, but only that a judgment shall be entered according to the verdict *as to those in regard to whom they do agree*.

Under all the authorities a jury can return a verdict of guilty as to all, or not guilty as to all; or

guilty as to some, and not guilty as to others; and this statute was intended merely to enable the jury to return a verdict as to some, and disagree, or, in other words, not return a verdict at all, as to others.

Furthermore, if the verdict be in this respect defective, it is not such a defect as these defendants can take advantage of, because it can not be conceived how they were injured by a failure of the jury to make any report as to the corporations.

This case is quite different on its facts from that of *Bucklin v. United States* (159 U. S., 682, 684, 685), cited by petitioners. In that case, after the jury had deliberated three days, they returned into court and through their foreman propounded to the court this question, "Can we find a verdict as to some of the defendants and disagree as to the others?" to which the court answered, "You can find a verdict of guilty as to all, a verdict of not guilty as to all, or you can find some guilty and some not guilty, but you can not find a verdict as to some and disagree as to others." This court was clearly right in holding that this instruction could have prejudiced the defendants, because it was apparent there was a serious disagreement among the jurors; and it was very probable that some members of the jury, though having serious doubts as to the guilt of some of the defendants, would consent to their conviction rather than permit other defendants to escape punishment. In the present case there was no such constraint upon the jury.

A number of authorities are cited by counsel for petitioners, very many of which are in civil cases, and none of which, it is respectfully insisted, are in point. On the other hand, the following authorities fully support the Government's position:

With reference to a verdict which finds the defendant guilty of a part of a charge, making no mention of the remainder, in 1 Bishop's New Criminal Law, section 1006, it is said:

Where the verdict is guilty of a specified part of the charge, making no mention of the rest, the courts differ as to its effect. Some hold it too incomplete to sustain any judgment; others treat it as an acquittal of the part on which it is silent; others permit the prosecuting officer to *nol-pros* the part not responded to; and others disregard such part altogether and proceed to judgment for that on which the voice of the jury is distinct.

A glance at the notes shows that the overwhelming weight of authority favors the position that such a verdict is good as to those against whom it is returned.

1 Bishop's New Criminal Procedure, fourth edition, section 1036, paragraph 2, is directly in point. There it is said:

The jury may convict a part of the defendants and disagree as to the others, or acquit a part and convict *or leave the charge open as to the rest*; in wider terms, the case may proceed to verdict and judgment against one or more in advance of others; but where the of-

fense and indictment are such that the acquittal of one shows another to be innocent as the averment stands, the one can not be found not guilty and the other guilty.

In *Weatherford v. Commonwealth* (10 Bush (Ky.), 73) it was held that though several persons be jointly indicted for distinct offenses charged to have been jointly committed when not susceptible of a joint commission, if the indictment charge the one on trial in person with the commission of the offense the judgment should not be arrested. This authority sustains the contention that a verdict of this character is good as to everyone embraced therein and not injured thereby.

A glance at the testimony will show why no verdict was rendered by the jury as to the corporations. The indictment charges that the defendants, Naval Stores Co., a corporation organized under the laws of West Virginia, and that the National Transportation Terminal Co., a corporation organized under the laws of New Jersey, participated in the conspiracy; while the proof shows that for some reason, wholly unexplained, the defendants had deemed it advisable to obtain additional charters under the laws of New York for corporations having precisely the same names; and hence it was not certain which of these sets of corporations were guilty of the acts charged. The jury, therefore, was entirely right in refusing to return any verdict at all as to those corporations, and leaving the matter open as to them for further inquiry.

Again, no objection whatever was made to this verdict when it was returned in open court, and no request was made of the court by counsel to make inquiry of the jury with reference to the defendant corporations, nor was there any attempt thereafter to ascertain whether or not they had in fact considered the guilt or innocence of those defendants and disagreed as to them. It is insisted that it is not sufficient to raise the question by a motion in arrest of judgment, without any preliminary effort to ascertain the facts.

III.

The several assignments of errors based upon the refusal of the court to give peremptory instructions to return a verdict in favor of defendants and to submit to the jury certain requests, and upon certain portions of the charge delivered to the jury, and also upon the admission of testimony over objections by petitioners can not here be relied upon, because:

1. No motion for a new trial was made before the motion in arrest of judgment, and hence said motion was a waiver of any irregularity upon the hearing.

This contention is sustained by the following authorities:

Philpot v. Page, 4 B. & C., 160.

McComas v. State, 11 Mo., 116.

Bates v. Reiskenhianzer, 9 Ind., 178.

Gillespie v. State, Id., 381.

Republica v. Lacaze, 2 Dallas, 118.

1 Bishop's New Criminal Procedure (4th Ed.), sec. 1268.

2. Neither the minutes of the court nor the bill of exceptions shows that any motion for a new trial was made.

That a motion for a new trial is essential to review errors occurring during the progress of the trial in most jurisdictions see 29 Cyc., 736. In Georgia, the jurisdiction in which this case was tried, the rule appears to be that in the absence of a motion for a new trial the appellate court can not inquire into the correctness of the verdict, though it does not seem to be supported by the evidence, and, further, that only such rulings of the trial court as necessarily control the verdict or judgment rendered can be brought under review in the appellate court. (*Smith v. Smith*, 112 Ga., 351, 353; *Sikes v. Norman*, 122 Ga., 387; *Sanders v. State*, 84 Ga., 218; *Gibson v. Maxwell*, 85 Ga., 235; *Holsey v. Porter*, 105 Ga., 837.) In *Hedden v. Iselin* (142 U. S., 676) this court said:

If the finding of the jury was against the weight of evidence, the remedy was by a motion for a new trial, which does not appear to have been made, and this court can not exercise a function of the jury.

IV.

This court will not consider the various assignments of error based on the refusal of the court to submit to the jury propositions of law requested and upon alleged error in certain parts of the general charge, because the bill of exceptions does not contain the full charge given by the court.

It is a well recognized principle that before the court will reverse for alleged error committed by the court in either refusing to submit to the jury a request or for giving to the jury an erroneous proposition, it must be affirmatively shown that some injury may have resulted to the plaintiff in error in consequence of the action of the court complained of. The bill of exceptions in this case sets out a large number of requests which the court was asked to submit to the jury, and further shows that the court refused to submit same, and that exceptions were taken to the action of the court in due time. It also contains a few extracts from the general charge given to the jury and shows that exceptions to same were taken before the jury retired. But it does not purport to contain the whole or any considerable portion of the general charge given by the court, nor is there any statement in the bill of exceptions to the effect that the substance of the requests submitted to the court was not contained in the general charge, or that those portions of the general charge to which exceptions was taken, if erroneous, were not corrected in other parts of the charge. Under these conditions, no positive error is affirmatively shown, and the court will not

consider assignments of error based thereon. (*Reagan v. Aiken*, 138 U. S., 109, 113; *Bennett v. Harkrader*, 158 U. S., 441, 446; *Andrews v. United States*, 162 U. S., 420, 424; *Scaife v. Western North Carolina Land Company* (C. C. A., 4th Cir.), 90 Fed., 238, 248; *Myers v. Sternheim* (C. C. A., 9th Cir.), 97 Fed., 625; *National Cash Register v. Salling* (C. C. A., 9th Cir.), 173 Fed., 22, 26; *Columbia Manufacturing Company v. Hastings* (C. C. A., 7th Cir.), 121 Fed., 328, 332; *Southern Railway Co. v. Hardin* (C. C. A., 5th Cir.), 157 Fed., 645, 649; *Blake v. United States* (C. C. A., 1st Cir.), 71 Fed., 286, 287.)

As the insistence of counsel is that the requests should have been submitted to the jury by the court, in order that the instructions might conform to the evidence and that the parts of the charge complained of are erroneous because they do not apply to the facts proven, it is unnecessary to here discuss them as abstract propositions of law.

V.

The judgment should not be reversed because of any error committed by the court in permitting the introduction of testimony.

The evidence to which objection was made and exception taken to its admission is as follows:

1. The evidence of John W. West and Walter F. Coachman relating to the execution of a certain contract between the American Naval Stores Company and West, Flynn and Harris Company, and of a like contract between the Naval Stores Company and

the Patterson-Downing Company; and also to the admission of the contract between the Patterson-Downing Company and the S. P. Shotter Company, of the first part, and Consolidated Naval Stores Company, the West, Flynn and Harris Company, the Barnes and Jessups Company, and Alford Brothers, of the second part, the ground of objection being that the said testimony and contract did not tend to show coercion and was irrelevant.

This testimony was admissible for two purposes, first, as a circumstance tending to establish a concert of action or conspiracy among the defendants, and, second, because it did clearly tend to show coercion. Whether or not the circumstances surrounding the execution of the contracts as detailed by the witnesses fully made out a case of coercion was a question for the jury.

2. The evidence of William H. Hoskins relating to the extraction of turpentine from barrels, the ground of objection being that the technical charge was false gauging, and that the taking of turpentine from the barrels was not embraced in this allegation.

This evidence was admissible, though it may not have fallen directly within a specific allegation of the indictment. The extraction of turpentine from the barrels and thus defrauding the purchaser were acts of the same character as others proven, and tended to show a concert of action in this respect between the several defendants. The United States could not be confined in proving the existence of the conspiracy to evidence falling within the several methods

by which it was alleged the conspiracy was to be carried out, but any evidence either within or without the allegations of the indictment in regard to methods which tended to prove the conspiracy described was admissible. It has been held that it is admissible in proof of a conspiracy to commit a particular fraud, to show a like fraud committed by the alleged conspirators about the same time upon a third person. *Luckey v. Roberts*, 25 Conn., 486; *People v. Saunders*, 25 Mich., 119.

3. The evidence of O'Keefe and others wherein it was shown that the grades of large quantities of rosin were raised in the Brooklyn yards without previous inspection, the ground of objection being that ~~it did not prove that~~ there were no supporting allegations in the indictment.

Such conduct, if not with absolute strictness falling within the allegations of the indictment, was admissible for the reasons above stated.

VI.

The fact that no evidence was introduced in support of three specifications of methods by which the conspiracy was to be carried into effect did not constitute a fatal variance between the allegations of the indictment and the proof.

The essence of the offense charged was the formation of the conspiracy to restrain interstate and foreign commerce in turpentine and rosin, while the methods by which it was to be carried out were mere incidents. In the old form of indictment for murder

it was usual to specify a number of means by which the murder was accomplished, but it was never insisted that it was necessary to prove all the means alleged. There would be more reason in holding in a trial on the charge of larceny of twelve cows that the defendant could not be convicted on proof of his having stolen any number of cows less than twelve. The following authorities, it is submitted, are conclusive of this question:

In 3 Rice on Evidence, p. 169, quoting from *Harris v. People*, 64 New York, 148, it is said:

Where an indictment charges that the prisoner has stolen a number of articles, or has inflicted a number of blows, or has obtained goods by a number of false pretenses, or has sworn falsely in an affidavit as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offense charged.

In 2 Bishop's New Criminal Procedure, section 233, paragraph 3, it is said:

To commit one offence—being the object of the conspiracy charged, proof that it was to commit another will not suffice. But the manner of committing it may be shown in a form more minute than the allegation, or varying from it in nonessentials. And if the parts of the charge are separable, no more need be proved than will simply constitute the offence; as, if the alleged purpose is "to prevent the workmen of C. from continuing to work," &c., it will be adequate to show the purpose as to any of the workmen.

See *Rex v. Bykerdike*, 1 Moody & R., 179.

In 1 Bishop's New Criminal Law, section 792, it is said:

Where the indictment is for a conspiracy to commit an offence, and the proofs establish that the conspirators actually committed it; or for manslaughter, and murder is shown; or for larceny, and it was perpetrated in the course of a burglary or a robbery; or for malicious mischief, and the facts appearing would equally sustain a charge of larceny; or for inflicting a battery on one man, when in truth the blow took effect on two; or for the nonrepair of one street, when the neglect covered several streets; or for being accessory to one person, while more persons also were guilty of the principal offense—in these and the like cases, the defendant may be convicted of what is charged against him, if, like what is not charged, it is sustained by the evidence.

As the offense consisted in the entering into the conspiracy, proof of such offense by evidence showing facts additional to those specifically alleged in the indictment is as much a variance as proof of its existence by a less number of circumstances than those alleged.

In *Commonwealth v. Meserve*, 154 Mass., 64, 72, 73, the court said:

It is conceded in the argument for the defendants that in an indictment for obtaining goods by false pretences the Government is not held to proof of all the pretences alleged. See cases cited in 2 Bish. Crim. Proc., sections

165-171. But if there is no variance in such case, it certainly would savor of great refinement to hold that there is a variance when the indictment charges a conspiracy to obtain the goods by several false pretences, and only one is proved. The ground taken in argument is that in the latter case the agreement between the conspirators is not proved as laid. But the means by which the cheating is to be accomplished are not necessarily to be held to be indivisible.

* * * * *

No case is cited or has come to our notice where it has ever been held that it is a variance if some of these contemplated means are not proved as alleged, provided any criminal or unlawful means which are alleged are proved. At *nisi prius*, in England, it was held that a charge of a conspiracy "to prevent the workmen of the said J. G. from continuing to work" was well supported by evidence of a conspiracy to prevent one workman. *Rex v. Bykerdike*, 1 Mood. and Rob., 179. So, also, that a charge of a conspiracy by false pretences to extort money was supported by evidence of a conspiracy to extort money without reference to the false pretences. *Regina v. Yates*, 6 Cox C. C., 441. Also, that if an act is charged to have been done with several intents, proof of one is enough. *Rex v. Evans*, 3 Stark. N. P. C., 35. We think the substance of the issue is sufficiently proved by proving any one of the pretences laid, provided such pretence would be sufficient if it alone had been charged. The mentioning of the various false pretences is

rather a matter of enumeration than of essential description, and those pretences not proved to have been contemplated may be rejected in the indictment.

VII.

The Court did not err in refusing to direct a verdict in favor of petitioners.

1. *Technical trade names.*

In order for the court to apply the evidence to the charges in the indictment it may be well to bear in mind certain preliminary observations in regard to the trade which it is charged that the petitioners conspired to restrain and monopolize.

1. Naval stores is a mere trade name for turpentine and rosin, produced principally in the South Atlantic and Gulf States. (R., 77-81.)

2. The producer or manufacturer is called an operator. (R., 77.)

3. The factor receives shipments of naval stores from the operator and sells for the operator to the distributor or exporter. (R., 77.)

4. Turpentine is quoted and sold by the gallon. (R., 152.)

5. Rosin is classified into 14 grades: A, B, C, D, E, F, G, H, I, K, M, N, WG, WW, and is quoted and sold by the barrel of 280 pounds. (R., 81, 226.)

6. Savannah, Ga., is the basic market for naval stores, where prices are quoted on the board of trade; other markets following the range of Savannah prices. (R., 208, 209.)

7. Closed ports are those ports at which the market is based on Savannah quotations. (R., 78.)

8. Turpentine expands and contracts according to temperature, and to allow for this at the time of inspection each barrel should be filled to one gallon less than its full capacity, which is called packing. (R., 102.)

9. In Georgia and Florida, under State laws, turpentine is gauged and rosin graded by State officers called inspectors. (R., 82, 101, 102, 136.)

10. Consumers rely on these southern inspections. (R., 211, 212.)

11. Naval stores enter very largely into interstate and foreign commerce. (R., 130, 131.)

2. *The relationship of the parties.*

It may also be well to outline the relationship of the parties before we undertake to point out the specific acts relied on by the Government to prove the conspiracy and the connection of the petitioners therewith.

The American Naval Stores Co., a corporation organized under the laws of West Virginia; the National Transportation & Terminal Co., a corporation organized under the laws of New Jersey; and six individual defendants, to wit, the five petitioners here, and one C. J. DeLoach, were indicted for conspiring among themselves and with divers other persons to the grand jurors unknown, to restrain and monopolize trade and commerce. (R., 1.) Edmund S. Nash was the president of the American

Naval Stores Co.; Spencer P. Shotter was the chairman of its board of directors; J. F. Cooper Myers was its vice president; George M. Boardman was its treasurer. (R., 221, 222.) Meyers was also president of the National Transportation & Terminal Co. (R., 221.) Carl Möller was the general manager of the National Transportation & Terminal Co., and manager of the Florida business of the American Naval Stores Co. (R., 178.) The American Naval Stores Co., at the time of its organization in December, 1906, succeeded to and took over all of the properties of the S. P. Shotter Co., the Patterson Downing Co., and an Antwerp Co., formerly carrying on the business of distributors of naval stores. (R., 156.) The National Transportation & Terminal Co. had storage yards and warehouses at Jacksonville, Fernandina, Tampa, and Pensacola. (R., 203.) The American Naval Stores Co. owned all of the stock of the National Transportation & Terminal Co. (R., 156.) It developed at the trial that another National Transportation & Terminal Co., incorporated under the laws of the State of New York, owned a similar yard and storage warehouse at Brooklyn, N. Y., but all of the stock of this company was owned by the American Naval Stores Co. of New York, all of the stock of which is owned by the American Naval Stores Co. of West Virginia. (R., 188.)

3. *Specifications in the indictment of the means by which the conspiracy was to be effected.*

In each of the two counts in the indictment submitted to the jury there were 12 specifications of the different means by which the conspiracy was to be effected, three of which were abandoned and withdrawn from the jury. We will consecutively number the remaining nine specifications and briefly refer to the evidence and circumstances relied on to prove the same.

1. "By controlling, manipulating, and arbitrarily bidding down in the market the market prices of spirits of turpentine and rosin so that competitors and producers could not sell said articles of commerce except at ruinous prices."

During the three months immediately preceding the return of the indictment the receipts at the port of Savannah were, turpentine, 28,974 barrels; rosin, 85,843 barrels. During this period at Savannah, where the principal office of the American Naval Stores Co. was located, and where superior facilities were afforded for handling and shipping spirits of turpentine and rosin, the American Naval Stores Co. purchased 2,066 barrels of turpentine and 28,826 barrels of rosin. (R., 99, 227.) During the same period at Jacksonville, where the facilities were inferior, the receipts were, turpentine, 15,805 barrels; rosin, 82,126 barrels; of which the American Naval Stores Co. purchased turpentine, 11,332 barrels; rosin, 46,926 barrels. (R., 101, 83.) During this period the American Naval Stores Co. was trying to

keep down the market quotations at Savannah. (R., 151, 192.) And no more effective method could have been devised than for the largest distributor in the trade to stay out of the basic market where prices for the other markets are fixed and draw its necessary supply from those other markets at the depressed Savannah prices. Another and perhaps more striking illustration is that during the month of March, 1908, the month immediately preceding the return of the indictment, the receipts of spirits of turpentine at Jacksonville were 5,274 barrels, of which the American Naval Stores Co. purchased 4,289, or about 80 per cent; and in Savannah the receipts of spirits of turpentine were 5,767 barrels, of which the American Naval Stores Co. purchased 208; the percentage, according to Mr. Nash, being infinitesimal. (R., 192.)

2. "By coercing and causing naval stores receipts which would normally and naturally flow to one port of the United States to be diverted to another port of the United States."

When the American Naval Stores Co. desired to force the West Flynn Harris Co. to enter into a contract for the exclusive handling of all of that company's Jacksonville receipts by the National Transportation & Terminal Co., it being the largest distributor in the market, it refused to bid at Jacksonville at all for the receipts of the West Flynn Harris Co., which naturally and immediately compelled the West Flynn Harris Co. to ship a large portion of its receipts to Savannah, where there was an open market. (R., 67.)

3. "By purchasing thereafter at divers times a large part of its supplies at naval stores ports known as closed ports, and willfully and with the deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases if made would tend to strengthen prices and market therefor; the said Savannah market being the basic or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulf Port, and Mobile, on a basis of the market at Savannah."

Under this specification, without repetition, we refer to what has been said in regard to specification No. 1, calling attention to the fact that Fernandina and Tampa are included in Jacksonville receipts.

4. "By coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into."

The American Naval Stores Co., the largest distributor, refused at first to bid for any of the receipts of the West Flynn Harris Co. at Jacksonville, and when this company diverted its receipts to Savannah it there refused in the open market to make any bid for the receipts of the West Flynn Harris Co. until it would enter into an exclusive contract with the American Naval Stores Co. for the storage of all of the

West Flynn Harris Co. receipts at Jacksonville on the yards of the National Transportation & Terminal Co., and for the exclusive sale of all of its Jacksonville receipts to the American Naval Stores Co. (R., 67, 68, 74, 75, 219, 220.) The American Naval Stores Co. also took over and ratified the contract between the Consolidated Naval Stores Co. and the S. P. Shotter Co. (R., 220), which Moller insisted should be carried out at the expense of a boycott by the American Naval Stores Co. (R., 148, 220.) The motive which prompted the American Naval Stores Co. in executing these exclusive contracts was not only to secure the additional revenue from storage and terminal charges but to get all of this turpentine and rosin on to practically private yards of its own for unlawful purposes, which will become more apparent in our explanation under specification No. 5.

5. "By fraudulently grading, regrading, and raising grades of rosins and falsely gauging spirits of turpentine."

As previously stated under the head of "Technical trade names," rosin at the ports is sampled and graded by sworn State inspectors, who mark upon the barrels the respective grades of the contents thereof; and turpentine is gauged or measured by these inspectors, who mark upon the barrels the quantity of the contents thereof; and in filling the barrels it is necessary to leave a space equal to 1 gallon to allow for the expansion of turpentine.

On the yards of the National Transportation & Terminal Co., at Jacksonville it was the invariable

custom for the employees, after the inspector had measured the contents of each barrel, to extract from each barrel one-half gallon to one gallon and re-fill other barrels with the contents so extracted. (R., 115, 143.) As a corroboration of the testimony of former employees who testified as to this practice, barrels of turpentine reaching customers in New York were short as to contents. (R., 121.) Former employees on the yards of the National Transportation & Terminal Co. at Brooklyn, N. Y., testified positively and convincingly that when rosins belonging to the American Naval Stores Co. would arrive at these yards, without opening the barrels or any reinspection they, under direction of the superintendent, would erase the mark indicating the grade of the contents thereof and place new marks thereon indicating a higher grade. (R., 85, 91, 95, 96, 216.) Corroborating the testimony of these former employees was the testimony of customers that frequently barrels of rosin when they reached such customers showed clear evidence that the old marks had been shaved off and new marks placed thereon. (R., 107, 109, 145, 126.) The effect of this practice on competition would perhaps not require any proof, for it can readily be seen that an honest dealer, who would scorn the very idea of changing the grade, would be utterly incapable of competing with the dealer who did so change the grade. But the effect of these practices is fully explained in the record by the testimony of experts in the trade. (R., 131, 140.) This testimony is also corroborated by the

testimony of the defendant Nash, who admitted under cross-examination that the American Naval Stores Co. in its code had a word which meant that certain customers were in the habit of taking rosin at the grade represented by the American Naval Stores Co. without any further inspection or investigation. (R., 193, 194.)

6. "By inducing customers by payments of bonuses and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices."

In the trial court the Government was held down strictly to the proof of particular instances mentioned in the bill of particulars, but the Government did show that in the instance of the Lilley Varnish Co. the American Naval Stores Co. did postpone delivery until the change in the market and did pay bonuses or damages for such postponed delivery. (R., 124.)

7. "By making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contract for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers."

Under this head the witness, Graves, of Philadelphia, fully explains how the American Naval Stores Co.'s representative there would make offers and when

accepted refuse to fill the same at all, or for only a small quantity. (R., 104.)

8. "By at divers times selling spirits of turpentine and rosins at prices far below the actual cost to themselves so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors."

The defendant Shotter testified (R., 201) that he was the largest individual producer of naval stores in the world, and it will be made clear under the following specification that during the period under investigation turpentine and rosin were sold in the markets at far below the cost of production; therefore the court properly submitted this specification to the jury, and the jury had the right to infer that inasmuch as Mr. Shotter practically controlled the policy of the American Naval Stores Co. he could have had no other motive in permitting the market to be depressed and thus deprive him of a large personal profit other than to drive competitors out of business.

9. "By willfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production."

The cost of production of spirits of turpentine was testified to by several experts in the business (R., 117, 118, 119), and the range of prices during the period under investigation, particularly during the months of February and March, 1908, when the American Naval Stores Co. was practically staying out of the Savannah market, showed that frequently

the price of turpentine went far below the average cost of production.

We respectfully submit that there was some evidence as to each of the foregoing nine specifications, and that some of them were overwhelmingly proven, and that the action of the court in submitting all of these specifications to the consideration of the jury was proper; and we further submit that the evidence outlined under each of the foregoing specifications, together with all the other evidence in the case, authorized the jury to find that there was a conspiracy to restrain and monopolize trade.

4. *The petitioners were shown to be parties to the conspiracy.*

Edmund S. Nash was president of the American Naval Stores Co., in charge of its Savannah office. He was present when the negotiations with the West Flynn Harris Co. were had and signed the contract in behalf of the American Naval Stores Co. (R., 68, 220.) He had general charge of the affairs of the company and directed its market policy. (R., 186, 187.) Reports were made from the New York office and the Jacksonville office to the Savannah office daily, which reports would have necessarily shown the fraudulent practices in regard to regrading and gauging. (R., 166, 178.) His entire testimony, both on the direct and cross-examination, shows that he was thoroughly conversant with all of the details of the business of the American Naval Stores Co., and it is inconceivable that all of these things could have been done without his knowledge and consent; and

the jury so found. Spencer P. Shotter was the chairman of the board of directors; had daily access to the Savannah office; was present when the negotiations with the West Flynn Harris Co. were had, and stated to Richmond in regard to that contract that he would stand for no dictation from him. (R., 75.) He had access to all the reports made to the Savannah office and kept in touch with the general business of the company, and told Turner in New York, in March, 1907, that the Patterson Export Co., a competitor, would not last long. (R., 144.) Shotter also, according to his own testimony, was the largest producer of naval stores (R., 201), and why should he permit the American Naval Stores Co. to stay out of the Savannah market and depress prices if there was not some ulterior motive to be accomplished later. A careful reading of his entire testimony will show that he was entirely conversant with all of the details of the business of the American Naval Stores Co., and his testimony evidently did not favorably impress the jury.

George M. Boardman was the treasurer of the American Naval Stores Co. and was so much in the control of affairs in New York that the general manager could not employ a foreman without referring the matter to Mr. Boardman. (R., 86.) His conversation with Mr. Coachman and his letter to Myers show conclusively that he was cognizant of a plan to drive out all competition. (R., 147, 224, 225.)

J. F. Cooper Myers was the vice president of both the American Naval Stores Co. of West Virginia and

the American Naval Stores Co. of New York. He was president of the National Transportation & Terminal Co. of New Jersey, where the fraudulent practices were carried on. He received all of the Savannah reports and the letter from Boardman to him, produced by Boardman, showed conclusively that he was entirely familiar with the plan of the American Naval Stores Co. to stifle competition. (R., 224.)

Carl Moller was the manager of the Jacksonville office of the American Naval Stores Co. and was also general manager of the National Transportation & Terminal Co., where the fraudulent practices were carried on. He made daily reports by letter, telephone, and telegraph to the Savannah office. (R., 178.) He stated to the witness Hoskins that the witness had been employed by the American Naval Stores Co. long enough to know that it would not stand for competition. (R., 115, 116.)

We have only briefly referred to certain of the more salient points in the testimony, but we feel confident that a careful study of the entire record will show that there was ample evidence to justify the verdict of the jury as to each of the petitioners here.

For the foregoing reasons it is insisted that the judgment of the court below should be affirmed.

JAMES A. FOWLER,

Assistant to the Attorney General.

ALEXANDER AKERMAN,

United States Attorney,

Southern District of Georgia.

10

Motion to advance.

In the Supreme Court of the United States

OCTOBER TERM, 1910

EDMUND S. NASH, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES,

Defendant in Error.

Office Supreme Court, U. S.
FILED.

APR 24 1912

JAMES H. MCKENNEY

CLERK

No. ~~446~~ 197.

Petition to advance cause

SAM'L B. ADAMS,

JOHN C. SPOONER,

Attorneys for Petitioners.

In the Supreme Court of the United States

October Term, 1910

EDMUND S. NASH, *et al.*,

Plaintiffs in Error,

vs.

THE UNITED STATES,

Defendant in Error.

No. 842.

**TO THE HONORABLE THE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:**

The petition of Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman, and Carl Moller, respectfully prays the Court that the above mentioned cause before the Court on a writ of certiorari from the United States Circuit Court of Appeals for the Fifth Circuit, be advanced to the end that a speedy hearing may be had of the writ of error.

As will appear by reference to the petition for the writ of certiorari, heretofore granted by the Court, and the transcript of the record filed with the petition, your petitioners were indicted in the United States Circuit Court for the Southern District of Georgia and Eastern Division on the 11th day of April, 1908, charged with a violation of an Act of Congress passed July 2nd, 1890, commonly known as the

Sherman Anti-Trust Act, the said indictment containing three counts. The third count was dismissed on demurrer, and your petitioners were convicted under the first and second counts on the 10th day of May, 1909. The case was taken by your petitioners to the said Court of Appeals, was argued in the said Court on the 4th and 5th days of October, 1909, and on the 29th day of November, 1910, a Per Curiam decision was rendered in the said cause as follows: "A majority of the Court is of opinion that there is no error in the record. The judgment of the Circuit Court is, therefore, affirmed."

A petition for the writ of certiorari was submitted by your petitioners to this Court on the 30th day of January, 1911, was subsequently granted by this Court and the cause is now pending in this Court under the said writ.

This application for the advance of the said cause is based upon the following grounds, to-wit:

1. The long delay that has ensued since the indictment of your petitioners under charges seriously reflecting upon them, and calculated to do them serious personal and business harm.

Immediately after the indictment your petitioners sought and urged a hearing, but were not able to secure a hearing until about one year after the indictment.

More than fourteen months elapsed after a hearing in the Court of Appeals before a decision was rendered, and, unless the cause is advanced, there may be, since the grant of the writ, a further delay of perhaps two years.

Notwithstanding the adverse verdict of a Jury and the decision of the Court of Appeals, your petitioners believe that the verdict and judgment against them are erroneous and that they can demonstrate to the satisfaction of this Court their innocence. They submit that they ought to be given an opportunity of doing so at as early a day as may be consistent in the judgment of this Court with the public interests.

2. Save only this case, that of the United States vs. the Union Pacific Coal Co., reported in 173 Fed., 737, and the

recent case of the United States vs. Kissell, et. al., involving the Statute of Limitations, no criminal case, based on this Statute, has ever been before any United States Appellate Court.

3. The reasons given in the petition for the writ of certiorari why the said writ should be granted conduce also, we submit, to the conclusion that a speedy hearing ought to be had.

The assignments of error bring before the Court the validity of the law as a penal measure, its scope and effect, and the decision of this Court will, necessarily, be of large importance to the business world and the profession. As stated in the petition, despite the fact that the Sherman Act has been upon the Statute Books for twenty years, without amendment, it may be safely said that the inferior Federal Courts and the Bar and those engaged in trade and commerce are in distressful doubt as to the true scope and construction of the Act and as to what may or may not be lawfully done without violating its provisions.

The theory of the Government involved in this prosecution, if sustained by the evidence (and your petitioners earnestly insist that it was not sustained) will lead to far-reaching and most unfortunate consequences. It will mean that a trader is subject to the pains and penalties of this Act should his employees be guilty of cheating and swindling, like using false weights and measures, and any case of alleged fraud can be brought within the ban of the Act. If this be sound, then the Sherman Act has transformed crimes against the several States into crimes against the Nation.

If the conviction be sustainable, then if traders form an agreement which may afterwards be construed as being obnoxious to the Statute, they may be punished criminally, although they do nothing whatever to advance the agreement and, immediately after its formation, abandon it and do no hurt of any kind to Interstate Commerce, and do nothing violative of the spirit of an Act entitled "An Act to protect trade and commerce against unlawful restraints

and monopolies." Such a holding will be contrary to the whole trend of our legislation touching conspiracies. If sound, then the business world and their legal advisers ought to be advised of it by an authoritative decision.

Without repeating the reasons set forth in the petition for the writ, and the assignments of error set forth in the record, we submit that the questions involved in this case are now of very great and urgent interest to the public and the profession, and we petition the Court that the cause be advanced under its rule.

SAM'L B. ADAMS,

JOHN C. SPOONER,

Attorneys for Petitioners.

The undersigned Attorneys for the Petitioners certify that we believe to be true all of the allegations in the foregoing petition for an advance of the cause mentioned, and that the said petition is well founded. This April --, 1911.

To the Attorneys of the United States:

You are hereby notified that on Monday, April 24th, 1911, we will submit the foregoing petition to advance the cause mentioned of Edmund S. Nash, et. al., vs. The United States.

This April --, 1911.

Service of the foregoing notice and petition acknowledged. Copy received. Further service waived. This April --, 1911.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

EDMUND S. NASH, ET AL.,
Petitioners,

AGAINST

THE UNITED STATES,
Respondent.

**TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES :**

Your petitioners, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, respectfully represent that on the 11th day of April, 1908, an indictment was found against them, against two corporations, the American Naval Stores Company and the National Transportation and Terminal Company, and against C. J. DeLoach, in a case sounding The United States vs. the American Naval Stores Company, *et al.*, in the United States Circuit Court for the Southern District of Georgia and Eastern Division; the said indictment being based on an act of Congress passed July 2nd, 1890, commonly known as the Sherman Anti-trust Act. The said indictment contained three counts.

That on the 12th day of April, 1909, the cause came on to be heard, and a demurrer was filed by all of the defendants, including the two corporations and C. J. DeLoach, and the same was heard by the Hon. WILLIAM B. SHEPPARD, a United States District Judge for the Northern District of Florida, designated to hold the Court. After argument the demurrer was sustained as to the third count and overruled as to the first and second counts.

The first count undertook to charge a conspiracy to restrain trade, and that as a part of this conspiracy certain means set forth in the count were stated. The second count charged a con-

spiracy to monopolize trade by the use of identically the same means. The pleader elected to make two counts out of identically the same means. Neither of the two counts charged any overt act of any kind, nor that anything was done in pursuance of the alleged conspiracy, and both included the means as a part of the conspiracy agreement.

The defendants plead not guilty, and on the 10th day of May, 1909, the jury in the said case found a verdict convicting your petitioners on the first and second counts, acquitting the defendant DeLoach (the Government at the conclusion of the testimony having abandoned the case as to DeLoach), but made no return as to the corporate defendants, the verdict being silent as to them.

The case was taken to the United States Circuit Court of Appeals for the Fifth Circuit by your petitioners on a writ of error, and was argued before the Court of Appeals on the 4th and 5th days of October, 1909, the said court being composed of the Honorable DON A. PARDEE and DAVID D. SHELBY, Circuit Judges, and the Honorable RUFUS E. FOSTER, District Judge.

On the 29th day of November, 1909, nearly fourteen months after the argument, the said Circuit Court of Appeals handed down a decision of which the following is a complete copy: "A majority of the Court is of opinion that there is no error in the record. The judgment of the Circuit Court is therefore affirmed."

On the 15th day of December, 1910, your petitioners filed in the said Circuit Court of Appeals a petition for a re-hearing, and this petition was denied on the 20th day of December, 1910, without further opinion.

Petitioners pray the Court for a writ of *certiorari* and submit that this is a proper case for the granting of said writ, and for the following among other reasons:

I.

The great importance of the Act involved to the business world and the legal profession, and the need of an authoritative and elucidating decision, particularly as to the penal provisions of the Act.

Except the recent case of *United States v. Kissell, et al.*,

involving the statute of limitations, no criminal case based on this statute has ever been before this Court.

Save only the case of *United States v. Union Pacific Coal Company, et al.*, reported in 173 Federal, 737, and the case of these petitioners, no case involving the penal provisions of this statute has ever been before any United States Circuit Court of Appeals.

Your petitioners Shotter and Myers are the first men sentenced to imprisonment for violation of this statute whose case has ever come before this Court, or any United States Court of Appeals, and the judgment against them by the Circuit Court of Appeals was made by a divided Court without opinion after a deliberation of fourteen months.

II.

Despite the fact that the Sherman Act has been upon the statute books for twenty years without amendment, it may be safely said that the inferior Federal Courts and the Bar and those engaged in trade and commerce are in distressful doubt as to the true scope and construction of the Act, and as to what may or may not be lawfully done without violating its provisions. As the trial judge in this case said, at page 39 of the record: "Owing to the distressing uncertainty of the penal sections of the Act under which the prosecution is maintained, it is difficult to see what acts or conduct would come within the purview of the statute." It is the expectation that some part of this uncertainty will be removed by the decisions of this Court in the Standard Oil and Tobacco Cases now before it and set for argument on January 3rd.

III.

While this case raises novel questions of law not involved in either the Standard Oil or Tobacco cases now before the Court, nevertheless a reversal on the merits in either of those cases would almost certainly show that your petitioners were wrongly convicted; and unless this petition be granted it will then be too late to remedy the wrong caused thereby to your petitioners.

The decision of the Circuit Court of Appeals in this case

is not helpful in that it did not notice any of the questions involved, and it appears only that a majority of the Court found no error in the record. An exposition of the law was sought in the argument and in the petition for a rehearing. The Court was also asked to certify the legal questions to the Supreme Court.

IV.

Under Chapter 544, Laws of 19 , 32 Stat., 823 ; U. S. Comp. Stat. 1905, p. 623 ; Part of § 2, Act Feb. 11, 1903, in civil causes arising under the Sherman Act, a direct right of appeal from a decision of the Circuit Court is given to this Court. No such right exists under the statutes as to criminal causes. It is submitted that at least in the case of the first conviction for crime under this statute a review should be granted, otherwise mere property rights are treated as being of more importance than the liberty of the citizen.

V.

There is in this case a novel application of the Sherman Act not hitherto presented to this Court—or raised in the Tobacco or Standard Oil cases.

The record shows testimony which, the Government alleges, and which we deny, proved that certain employees of the corporation of which petitioners were officers swindled and cheated customers in another state, in certain isolated cases, by falsely labelling or falsely measuring goods. There is no proof that petitioners knew of these acts or had anything to do with them ; or had any agreement or intent to do them or caused them to be done. The theory of the Government is that this proof of isolated violations of State law, standing alone, warrants a conviction for conspiracy under the Sherman Act. This case raises the question of the correctness of that proposition. If it be sound law, then the Sherman Act has transformed crimes against the several states into crimes against the nation.

The point is further illustrated by the following statement of the facts : The only trader in the case is the American Naval Stores Company. The other corporate defendant is not

alleged or shown to be connected with trade in any way. It is a warehouse and terminal company only. The individuals are not alleged to be in trade on their own account, but are connected with the alleged conspiracy solely as officers of the American; all of the petitioners being such representatives.

There is no attack upon the formation of the American or of any other corporation mentioned in the evidence.

There was no effort made to show any combination or agreement between this trader and any other.

The theory of the Government is that this trader, after it was formed, attempted to increase its gains by doing things at Jacksonville, Florida, and Brooklyn, New York, which under the Government's theory were wrong and involved the violation of the State ^{statute} touching cheating and swindling.

If this theory be sound, then a corporation trading in groceries could be convicted of a violation of this Federal statute, if it appeared that its officers and employees put sand in the sugar sold by them, or used false weights and measures, or did anything else that was criminal or wrong.

If this theory be sound, then any case of alleged fraud or conduct claimed to be ethically wrong in business tactics can be brought within the terms of this statute.

There is not any evidence to show any conspiracy agreement between petitioners. The Government endeavored to show by certain isolated acts, which it claimed involved cheating and swindling, but which upon their face have nothing to do with the Sherman Act, that a conspiracy agreement existed, and then that the acts were under the ban of the statute because of the conspiracy agreement. The argument is conspicuously one in a circle.

It was not even shown that your petitioners or any of them were connected with these isolated acts.

VI.

The conspiracy is laid in the Eastern Division of the Southern District of Georgia. There is no evidence in the record that any offense was committed in said District or Division, and the Court was, therefore, without jurisdiction to try the case. This was error, but was more than mere error, it constituted want of due process of law.

As to three of the petitioners, there is no evidence that they had been within the District or Division within three years of the finding of the indictment.

By reference to page 79 of the record, the latter part, it will appear that the charge delivered to the jury on this subject as it was about to retire, is in the following words, to-wit:

“The conspiracy, the venue of this offense, will be where the conspiracy was formed; but a conspiracy may be formed by individuals residing in different States; or it may be carried from one District to another, if the object and purpose of that conspiracy has a means for transporting or been committed in another District than that which it was formed.”

That charge—which was the only part of the charge relating to the venue of the offense—was we believe so clearly erroneous, insufficient and misleading as to call for the reversal of the judgment.

VII.

The Sherman Act does not contain what is within the authorities and upon general principles an adequate description of any criminal offense, and the demurrer raising this point ought to have been sustained.

This point has never been passed upon by any Court. It is not identical with the question as to the constitutionality of the law. It is based upon the principle contained in the maxim, “*Ubi jus incertum, ibi jus nullum.*” To use the language of this Court in *United States v. Brewer*, 139 U. S. 288, “laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”

“Before a man can be punished his case must be plainly and unmistakeably within the statute.”

VIII.

The verdict rendered is illegal, contradictory and illogical, and should not be made the basis of the sentences inflicted, particularly the jail sentences.

The only trader mentioned in the entire record is the American Naval Stores Company. The whole case turns around that Company. If any conspiracy was formed it was for and in behalf of that Company. If it be withdrawn from the record, there is nothing left in the case.

By reference to page 82 of the record it will be found that,

"The jury impanelled in the said cause, after they had been in their jury room considering their verdict about two and a half hours, returned into Court with their verdict, finding the defendants, Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George Meade Boardman and Carl Moller, guilty on the first and second counts of the indictment, finding the defendant C. J. DeLoach not guilty and making no return as to the two corporate defendants, and no allusion to these corporate defendants. The jury was not interrogated as to these corporate defendants or either of them, and the verdict was rendered and the jury discharged. The instructions of the Court to the jury covered these two corporate defendants as completely as it did the individual defendants."

The theory of the Government on the trial was that the American Company conspired through the officers mentioned. The verdict means, it being tantamount to an acquittal of the American Company, that it did not conspire at all, and yet the verdict against these defendants means that it did conspire through these officers.

We have made this objection to the verdict not only by the motion in arrest of the judgment, but by the last assignment of error appearing at page 60 of the record.

IX.

The indictment charges no offense against the United States for the reason that in neither count is it averred that either or any of the alleged conspirators did in said District or elsewhere "any act to effect the object of the conspiracy" as required by Section 5440 of the Revised Statutes of the United States. For that omission of any averment of "overt

acts" said counts were demurred to, and the demurrer was overruled by the Court. This while error was not mere error, for a conviction and sentence under an indictment which charges no offense is not due process of law.

On this point the rulings of the several Circuit Courts of the United States seem in direct conflict. In *U. S. vs. Reichert*, 32 Fed. 142, Mr. Justice FIELD, sitting at Circuit, was of opinion that such an overt act was an essential part of the crime and must be alleged. The practice of the Second Circuit is the same (see the indictment in *U. S. vs. Kissell* recently before this Court). The opinion of Mr. Justice PUTNAM in *U. S. vs. Patterson*, 55 Fed. 605, indicates a different view in accord with the view of the Court of Appeals in this case. It would seem necessary not only because of this difference between the circuits but because of the intrinsic importance of the question that it should be finally and promptly settled by this Court. It is important to know whether an illegal intention or agreement not followed by any act to carry it into effect (which under § 5440 of the Revised Statutes is a necessary element of every other criminal conspiracy to commit an offense) constitutes a crime.

For these and the other reasons indicated in the argument accompanying this petition we ask that the writ be granted.

Counsel represent to the Court, that, if said writ be granted, they firmly believe they will be able to demonstrate to this Court not only that there has been a clear mistrial but that there is in the record no evidence of guilt as to any of petitioners which justified a verdict against them even if the opinions of the lower courts in the Standard Oil and Tobacco cases have correctly interpreted the Sherman Act.

Your petitioners believe that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding the said Court to certify and send to this Court, on a day certain to be therein designated,

a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals in the said cases entitled, Edmund S. Nash, *et al.*, Plaintiffs in Error, vs. The United States, Defendant in Error, Number 1951, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes", approved March 3, 1891, or that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper and in conformity with the said Act, and that the said judgment of the Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court. And your petitioners will ever pray.

John C. Spooner
 Saml. B. Adams.
 Atty's for Petitioners.

STATE OF NEW YORK, }
County of New York, } ss. :

JOHN C. SPOONER and SAMUEL B. ADAMS, being duly sworn, say : that they are of Counsel for Edmund S. Nash, Spencer P. Shotter, J. F. Cooper Myers, George M. Boardman and Carl Moller, the foregoing petitioners ; that they prepared the foregoing petition and that the allegations thereof are true as they verily believe.

Sworn to and Subscribed before me this 31 day of December, 1910.

(A Notary)

(Sg) John C. Spooner
" Samuel B. Adams

TO THE RESPONDENT IN THE FOREGOING CASE :

You are hereby notified that we will submit to the Supreme Court of the United States the foregoing petition for a writ of *certiorari* at the opening of Court on the day of January, 1911.

In the Supreme Court of the United States,

OCTOBER TERM, 1910.

EDMUND S. NASH, ET AL.,
Petitioners,

AGAINST

THE UNITED STATES,
Respondent.

ARGUMENT.

The petition for the writ of *certiorari* states a number of grounds submitted to show that the writ of *certiorari* ought to be granted.

The comprehensive and unlimited power of the Court is noticed in *Forsythe vs. Hammond*, 166 U. S., 512.

We submit that this case comes within the terms and conditions which apply to the granting of the writ. While its importance to the petitioners, even those under jail sentence, is not sufficient to invoke the power of the Court, yet the importance of the act and the necessity of a guiding precedent are important reasons for the exercise of the power.

In *Armour Packing Company vs. United States*, 209 U. S., 56, involving the Elkins Act, and, therefore, the same general character of legislation, this writ was granted. The Elkins Act was designed to protect interstate commerce from unlawful rebates and discriminations. The Sherman Act is one entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," and is broader and more

far reaching, affecting more people and more transactions, and, therefore, its authoritative and guiding exposition is more important.

In *Harriman vs. Northern Securities Company*, 197 U. S., 244, a case which involved the Sherman Act, the writ was granted. We submit that the penal provisions of the act are more important than those which affect only property.

Cases like *St. Louis, etc., Ry. Co. vs. W. Ry. Co.*, 217 U. S., 251, illustrate the character of cases in which the writ is granted. Our case, we submit, is a much stronger one, because in the case just mentioned the interests involved were not as important to the public as in the case at bar, and the value of its decision as a precedent was not so great.

We are aware that the Court is not disposed to grant the writ for mere error.

We earnestly submit, however, that this record is full of errors, which demonstrate not only the injustice and unlawfulness of the conviction, but also the far reaching character of the precedent involved in the theory upon which the conviction is based.

By way of example only, the Court will find by reference to pages 55 and 77 of the record (assignment of error 36) that under the charge the jury could have convicted petitioners if they found that "any of the means" alleged in the indictment were employed, if they further found that the necessary effect of these means was to restrain interstate and foreign commerce. Some of these means must be admitted to be perfectly innocent and indicate only ordinary business tactics such as going into the market when it suited the purposes of the trader and sometimes staying out of the market. Such conduct was admitted by the President of the Company in his evidence. It may be that the jury base their verdict upon the doing of this thing.

The charge of "Coercion" is amplified by the bill of particulars, and appertains to the contracts with the Consolidated Naval Stores Company and the West, Flynn & Harris Company. It is not alleged that these contracts were in themselves unlawful or improper. The Government's complaint is

confined to the charge of coercion. There is not any evidence to show coercion in any legal sense (see *Raddick vs. Hutchingson*, 95 U. S., 213, and the definitions of "Coercion," as collected in the Second Volume of Words and Phrases Judicially Defined. The charge was that a part of the conspiracy agreement contemplated "coercing factors and brokers into *entering into* contracts with said defendants for the storage and purchase of their receipts," *et seq.* (page 4 of the record). The bill of particulars on page 33 specifies the two Companies mentioned. In order to sustain the charge the Government put in the contract set forth on page 274 of the record, to which neither corporate defendant was a party in any way. The S. P. Shotter Company, which had gone out of business, was a party. It is dated the 7th day of December, 1906. It was simply taken over by the American as appears by the letter of the Vice President of the S. P. Shotter Company to be found on page 274. The same page, however, shows that "before the assumption of the contract by the American Naval Stores Company at the instance of the American the tenth and eleventh paragraphs were stricken." These paragraphs are given and they are the only paragraphs that suggest any pretext for the charge of the purpose to restrain trade within the meaning of the authorities. Out of an abundance of caution, to avoid even the appearance of evil, the American Naval Stores Company had these paragraphs stricken. We find nothing in the agreement that can be the subject of reasonable criticism, and yet against our objection the Court submitted to the jury the question as to whether the American had not coerced the Consolidated Naval Stores Company into "entering into the contract."

The undisputed evidence of Mr. Nash shows that instead of the number of competitors decreasing since the formation of the American they had actually increased.

There is no evidence at all to suggest that a single competitor was forced out of business, or that the business of a single competitor was restrained by anything that the American did.

The conversation with Turner (entirely innocent in itself and not suggestive of wrong of any kind) occurred on the 5th

day of March, 1907 (page 180). The Paterson Export Company referred to did not liquidate until nearly two years after this conversation (see Martin's evidence on page 162) and nearly a year after the finding of this indictment. Martin refers to the Naval Export Company as being "put out of business," but there is not any evidence to show that any party defendant had anything whatever to do with its going out of business.

We submit that the proposition that the statute is bad as a penal law is worthy of the adjudication of this Court.

This proposition does not assail the constitutionality of the legislation. A statute may be enforceable on the civil side of the Court and yet it may not be sufficiently definite and explicit to justify the infliction of its penal provisions. The principle is an old common law principle, and embodied in the maxim, "*Ubi jus incertum, ibi jus nullum.*"

In *United States vs. Reese*, 92 U. S., 219, this Court has said :

"If the Legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

On the next page the Court says :

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the Judicial for the Legislative Department of the Government."

To use the language of the Court in *United States vs. Brewer*, 139 U. S., 288, "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

To use the language of Chief Justice MARSHALL in *United States vs. Wittberger*, 5 Wheaton, 95, "it is the Legislature, not

the Court, which is to define a crime and ordain its punishment."

It is held by the courts that a law which undertakes to punish a carrier for charging "an unreasonable tariff," or giving an "undue preference," would be bad as a penal law. There would be no ambiguity about the words themselves, but they would fail to so define the offense as to advise citizens of what they must do to avoid penalties.

To use the language of Mr. Circuit Justice LIVINGSTON in *The Enterprise*, 8 Federal Cases, 732 *et seq.*, "where there is such an ambiguity in the penal statute as to leave reasonable doubts as to its meaning, it is the duty of the Court not to inflict the penalty."

In this connection we refer also to *Railroad vs. Day*, 35 Federal, 875, 876; *United States vs. Sharpe*, 27 Federal Cases, 1041 (7), 1043; *Toze vs. United States*, 52 Fed., 17; *L. & N. Railroad Co. vs. Railroad Commission*, 19 Fed., 679 (3), 690, 691, 692, 693; *McChord vs. L. & N. Railroad*, 183 U. S., 498.

We forbear at this time to enter into an extended argument in support of our contention. We will, however, cite the following text writers, who deal with this act: *Spelling on Trusts and Monopolies*, pages 221, 222, 223, 224. 2 *Eddy on Corporations*, pages 86, *et seq.*, 919, *et seq.* 2 *Lewis' Sutherland on Statutory Construction*, Section 520.

We submit that this point is worthy of the consideration of this Court.

We submit that the theory of the Government's case is unsound, not only for the reasons stated in the petition, but also under the principles recognized in the following authorities, which go very much farther than we need go in the case at bar: *In re Green*, 52 Fed., 104, 11, *et seq.* *Whitwell vs. Continental Tobacco Company*, 125 Fed., 454. *Phillips vs. Cement Company*, 125 Fed., 594, 595.

We are confident of our ability to show clearly, should the writ be granted, that a number of matters were submitted to the jury by the trial Judge as to which there was no evidence at all, and that such errors are material and require reversal.

It is important that the Court settle the question as to whether the judge or the jury should decide whether the

means alleged to be a part of the agreement are such means as involve an infraction of this statute, and this case invites this adjudication.

The Court will distinguish the case, even if the evidence shows such a case, which we deny, between an agreement to increase gains by fraudulent practices and an agreement to restrain or monopolize trade within the meaning of the Sherman Act. As said by the Eighth Circuit Court of Appeals in the Whitwell case, cited :

“ If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation.”

If the officers of a trading corporation have an understanding that they will practice frauds of any kind in order to increase their gains, while this may show an agreement to do things on the line of cheating and swindling, it would not show any agreement that violates the Sherman Act. In the case at bar it is earnestly insisted that there is no evidence to sustain even the theory suggested.

One of the grounds set forth in the petition for the allowance of the writ is the omission of averments in the counts of the indictment under which the defendants were convicted, that any act was done by one or more of the conspirators to effect the object of the conspiracy, and that the indictment, therefore, charges no offense against the United States. It is earnestly insisted that upon this ground, if there were no others, the writ should issue. It may be taken as true that at the common law no such averment was necessary, albeit sometimes incorporated. Offenses against the United States are statutory. Prior to 1867, the statutory conspiracy did not differ from the common law conspiracy. Under both, the offense was the conspiracy itself, “ the breathing together ” or agreement. But by Section 30 of the Act of March 2, 1867, 14 Statutes at Large, page 484, what is now substantially Sec-

tion 5440, was enacted as Section 30 of Chapter 169 of the Laws of that year. While the meeting of minds or conspiracy remained after the enactment of that statute, as it does to-day, the gist of the offense, something additional was required to render the offense indictable and punishable, and that was that some one or more of the conspirators should do an "act to effect the object of the conspiracy." This section while incorporated in a revenue act and contended at the outset to be limited to conspiracies against the revenue laws, was held by this Court not to be so limited.

In *United States vs. Hirsch*, 100 U. S., 33, Mr. Justice MILLER said :

" Looking then to the section in question which makes no mention of revenue whatever, but enacts in the most general terms a law against conspiracies, we are of the opinion that one of the other purposes of the act was to adopt this *general penal provision*, and that an offense punishable under that section alone is not a crime arising under the revenue laws, though the overt act necessary to be alleged may be one affecting the revenue of the United States."

Revised Statutes, Section 5440, is as follows :

" If two or more persons conspire either to commit *any offense against the United States* or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to the penalty of not less than one thousand dollars and not more than ten thousand dollars, or to imprisonment of not more than two years."

It is a compendious section and seems to prescribe a general rule in respect to conspiracies, and its departure from the common law is one of great significance. It ameliorated the harsh rule of the common law which made the meeting of minds or the mere agreement punishable, though the purpose was abandoned before a step had been taken to carry it into effect.

It was said by Mr. Justice WOODS in *United States vs. Britton*, 108 U. S., 204 :

" The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of

both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus pœnitentiæ*, so that before the act done either one or all of the parties may abandon their desire, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy."

This section seems to have been intended to embrace every conceivable conspiracy to defraud the United States in any manner and for any purpose, and every conspiracy to *commit any offence* against the United States. It is practically a statutory definition of the crime of conspiracy under the Federal Laws and seems to be applicable to every case of conspiracy under such laws, unless the law creating the particular offence excludes by its language, expressly or by necessary inference, its application.

In *United States vs. Reichert*, 32 Fed., 142, which was an indictment for conspiracy to defraud the government, the question arose whether or not the indictment was defective for want of an averment of any act to carry the conspiracy into effect. The indictment was found under section 5438, Revised Statutes. It is as follows :

"Every person who enters into any agreement, combination, or conspiracy, to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand dollars or more than five thousand dollars."

Mr. Justice FIELD and Judge SAWYER differed as to the necessity of alleging an act done to effect the object of the conspiracy, and in sustaining the demurrer, said :

"The Circuit Judge is of opinion that the count is defective only in the last particular stated, namely,

that it does not aver authority in the surveyor general to allow and approve the claim which was to be presented to him ; and that where the charge is of a conspiracy to *defraud the United States*, by obtaining or aiding to obtain the payment or allowance of a false, fictitious and fraudulent claim, it is not necessary to aver the performance of any act in furtherance of the conspiracy. In this respect, I am unable to agree with him. I am of opinion that section 5440 Revised Statutes, amended by the act of May 17, 1879 (21 St., 4), qualifies the provision of section 5438 ; and that a *conspiracy to defraud the United States or to commit any other offence against the United States, is not, of itself, an indictable offence, unless the conspiracy be followed by some act in furtherance of it*,—that is, to effect its object. Section 5440 applies to conspiracies to defraud the United States in *any manner or for any purpose*, and of course embraces the particular conspiracy mentioned in section 5438—to defraud the Government of the United States by ‘ obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.’ As under section 5440, the conspiracy to defraud must be followed by some act to effect that object, to constitute a public offence, it would seem that, to the extent in which the section differs in that particular from the offence of defrauding the United States mentioned in the preceding section, (5438) it must be held to qualify and amend that section. Were this not so we should have a general provision that in case of a conspiracy to defraud the United States in *any manner or for any purpose*, it would be necessary to show the doing of some act to effect its object by one or more of the conspirators, to constitute the offence, with a previous provision that, in case of a conspiracy to defraud the United States in a specified way, there would be no necessity of showing any act to carry the conspiracy into effect. Consistency is given to the statute by treating the latter section as qualifying the preceding one.” (The italics are ours.)

It will be noticed that section 5438, upon which the indictment purported to be found, denounced any agreement, com-

bination, or *conspiracy*, to defraud the Government, or any department or officer thereof, by obtaining the payment or allowance of any false or fraudulent claim, and prescribed a penalty. In other words, it was complete in itself, except that it did not come within what Mr. Justice FIELD seemed to consider to be the statutory definition of conspiracy against the United States contained in section 5440. It evidently was the policy of the Congress that no longer under Federal law, should a *mere agreement* to do an act in violation of the laws of the United States be indictable. It was the clear and humane purpose of the act to afford an opportunity for repentance. There seems to be no theory upon which it can be successfully contended that it was the intention of Congress that this *principle* should not be found in the word "conspiracy" wherever used in the Federal statute.

It seems hardly conceivable that in legislating against conspiracy, Congress could have intended, by the Act of July 2, 1890, in respect of the offense of conspiracy, to restrain or monopolize the trade and commerce of the United States, to return to the common law definition of conspiracy, which punished for a *mere agreement*. The word "conspiracy," in that Act, is not defined.

It would, but for Section 5440, and kindred legislation, have been inferred, the word being of settled legal signification at the common law, that it was used in its common law sense; but, as used in this statute, it would seem that it must be conceded to have been used, not with reference to its common law signification, but in the sense of conspiracy as defined by the Federal Statutes.

In the case of *United States vs. Kissel*, recently before this court from the Southern District of New York, the indictment was for a conspiracy under the Sherman Act. It was therein alleged, as has been the practice in most of the Circuits, that acts were done by one or more or all of the conspirators to effect the object of the conspiracy.

In the opinion of the Court in that case, it is said by Mr. Justice HOLMES :

"It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it."

At the common law, it did exhaust it. Under Section 5440 it does not exhaust it, for something in addition to the unlawful agreement is required to make the offense indictable. In the Kissel case the agreement was held to be a continuing agreement ; in other words, to be " a partnership in criminal purposes." Without overt acts it could not continue, for the agreement could not be carried into effect at all without an act by some one or all of the conspirators to effect the object of the conspiracy ; otherwise, it would be nothing more than a mere agreement.

Referring to the fact that conspiracy is a " partnership in criminal purposes," Mr. Justice HOLMES pertinently adds :

" That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

But for a first overt act, the partnership would have rested simply in agreement, and would have done nothing but agree. The reasoning of the opinion seems to imply that an overt act is necessary to the offense.

Mr. Justice HOLMES well says in the Kissel case :

" A conspiracy in restraint of trade is different from and more than a contract in restraint of trade."

The Anti-Trust Act provides that " every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal."

" Every person who shall make any such contract, or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor," &c.

The words " contract," " combination " and " conspiracy " cannot be taken to be synonymous. It is conclusively presumed, and each word was regarded as necessary to express the legislative intention. While it is true that " conspiracy " involves an agreement, and also involves a combination, there may be a contract and there may be a combination which is not a conspiracy. The conspiracy to make a contract in re-

straint of trade, the making of a contract in restraint of trade being an offense denounced, would seem necessarily to be brought under Section 5440 as a conspiracy to commit an offense against the United States. A conspiracy to enter into a combination in the form of a trust or otherwise in restraint of trade would seem also to be a conspiracy to commit an offense against the United States and necessarily to be brought under Section 5440. In either case it would be necessary that the indictment should aver some act by one or more of the conspirators to effect the object of the conspiracy. A conspiracy to restrain, by any means, trade and commerce of the United States, is an offense against the United States.

It seems quite impossible to believe that Congress could ever have intended to accord a *locus poenitentiae* in every case of conspiracy to commit any one of the long catalogue of offenses against the United States, involving varying degrees of moral turpitude, and have intended not to accord to the citizen prosecuted under the act to protect trade and commerce against unlawful restraints of trade and commerce the same opportunity for repentance. The question is important to the public interest. It is a grave one. It is one in respect of which difference of understanding and practice exist in different Circuits ; and it is here involved.

While the argument notices, with different degrees of elaboration, some points set forth in the petition, we earnestly and respectfully submit all of the grounds therein stated.

JOHN C. SPOONER,

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Counsel for Petitioners.

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CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 187.

EDMUND S. NASH, SPENCER P. SHOTTER ET AL.,
Petitioners,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

JOHN C. SPOONER,
GEORGE RUBLER,
Counsel.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 197.

EDMUND S. NASH ET AL.,
Petitioners,

vs.

THE UNITED STATES.

Certiorari to the United
States Circuit Court
of Appeals for the
Fifth Circuit.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

In this case the Petitioners were convicted of violating the Sherman Act under an indictment charging a conspiracy to restrain and monopolize trade and commerce among the several states and with foreign nations in naval stores.

For the sake of clearness it may be well to define certain terms.

"Naval stores" is a trade-name for spirits of turpentine and rosin, which are products of crude gum gathered from long-leaf yellow pine in the southern States. There are fourteen grades of rosin indicated by the letters A, B, C, D, E, F, G, H, I, K, M, N, WG and WW. A, B and C are the cheapest and darkest of these grades. They advance in lightness of color and in price from A to WW or "water white" rosin.

The only test of quality and value of rosin is color. There is only one grade of spirits of turpentine.

There are three classes of persons engaged in the naval stores industry: (1) producers or operators, (2) factors, (3) distributors or exporters.

The producer gathers the crude gum from the long-leaf yellow pine tree and converts it into spirits of turpentine and rosin. The factor is a kind of commission merchant. He makes advances to the producer under contracts requiring the shipment of naval stores to him and then sells for the account of the producer. The distributor or exporter purchases naval stores from the factor and sells them to consumers in the domestic and foreign market. The defendant, the American Naval Stores Company, is a distributor or exporter. It buys naval stores from factors.

The indictment in this case contains three counts. The third count was held bad on demurrer and therefore will not be further considered.

The first and second counts are alike except that the first count charges a conspiracy to restrain interstate and foreign commerce in naval stores and the second count charges a conspiracy to monopolize such trade and commerce. These counts name the defendants and charge that the defendant American Naval Stores Company, a corporation of West Virginia, was engaged in interstate and foreign commerce in naval stores from May 1, 1907, up to the date of the finding of the indictment, and that the defendant Edmund S. Nash was president, and the defendant Spencer P. Shotter was chairman of the board of directors, and the defendant J. F. Cooper Myers was vice-president, and the defendant George Meade Boardman was treasurer, and the defendant C. J. DeLoach was secretary of that Company, and the defendant Carl Moller was the manager of its branch at Jacksonville, Florida; that the defendant National Transportation and Terminal Company, a corporation of New Jersey, during the said period owned and controlled warehouses and terminal facilities for handling naval stores at various *southern* points and was engaged in storing spirits of turpentine and rosin in its yards, and that during said time the defendant J. F. Cooper Myers was the president, and the defendant C. J. DeLoach was the secretary of said National

Transportation and Terminal Company, and the defendant Carl Moller was the manager of its branch at Jacksonville, Florida. Then follows, in the first count, the charge of conspiracy to restrain, and in the second count, the charge of conspiracy to monopolize interstate trade and foreign commerce in naval stores, such restraint or monopolizing

“ to be effected, amongst other ways, as follows : By controlling, manipulating and arbitrarily bidding down and depressing in the market and market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices ; by coercing and causing naval stores receipts, which would nominally and naturally flow to one port of the United States to be diverted to another port of the United States ; by purchasing thereafter at divers times a large part of its supplies at naval stores ports known as closed ports and wilfully and with the deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basic or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on a basis of the market at Savannah ; by coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts, refusing to purchase from such factors and brokers unless such contracts were entered into ; by circulating and publishing false statements as to naval stores, production and stocks in hands of producers and their immediate representatives ; by issuing and causing to be circulated and hypothecated fraudulent warehouse receipts ; by fraudulently grading, regrading and raising grades of rosins and falsely gauging spirits of turpentine ; by attempting to bribe employees of competitors and factors so as to obtain information as to competitors’ business and stocks ; by inducing consumers by payment of bonuses

and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices; by making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers; by at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors; by wilfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production—each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such commerce among the several states and foreign nations in the aforesaid articles of commerce, and destroying competition and restraining trade in the aforesaid articles of commerce; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States.”

The Court will observe that there is no charge of anything unlawful in the organization of the American Naval Stores Company, which is the only defendant alleged to be engaged in interstate and foreign commerce, nor is there any charge that the American Naval Stores Company controls an unlawful portion of interstate and foreign trade in naval stores. The charge is of a conspiracy to be effected solely by the employment of twelve specific methods of unfair competition.

This case was tried in the Circuit Court of the United States for the Southern District of Georgia, Eastern Division. It was brought here by *certiorari* from the Circuit Court of Appeals for the Fifth Circuit. The plaintiffs in error were convicted on the first and second counts of the indictment on May 10, 1909. The Court sentenced the defendant Nash to pay a

fine of \$3,000, the defendant Moller to pay a fine of \$5,000, and the defendant Boardman to pay a fine of \$2,000. The defendant Shotter was fined \$5,000 and sentenced to imprisonment for three months. The defendant Myers was fined \$2,500 and sentenced to imprisonment for three months (Record, pp. 10-12). The judgment of the Circuit Court was affirmed on appeal by the Circuit Court of Appeals without written opinion, and a petition for rehearing was denied by that Court. This Court then granted a petition for a writ of *certiorari*.

Specification of Errors.

The assignments of error will be found on pages 36 to 48 of the Transcript of Record (references herein are to the top paging of the Record). They are also set out in the brief of associate counsel (pp. 8-30), and therefore need not be repeated here.

BRIEF OF THE ARGUMENT.

I.

The First and Second Counts of the Indictment are Bad because they do not allege any Overt Act.

The first assignment of error (Record, p. 36), is that the trial judge erred in not dismissing the first and second counts of the indictment upon the demurrer filed by the defendants. The bill of exceptions to the judgment overruling the demurrer appears on page 20 of the Record. The demurrer appears on page 13. Grounds 4 and 7 of the demurrer allege that the first and second counts of the indictment are bad because they do not allege that any act of any kind was done by the defendants or any of them.

It may be taken as true that at the common law no averment of an overt act was necessary, albeit sometimes incor-

porated. Offenses against the United States are statutory. Prior to 1867, the statutory conspiracy did not differ from the common law conspiracy. Under both, the offense was the conspiracy itself, "the breathing together" or agreement. But by Section 30 of the Act of March 2, 1867, 14 Statutes at Large, page 484, what is now substantially Section 5440, was enacted as Section 30 of Chapter 169 of the Laws of that year. While the meeting of minds or conspiracy remained after the enactment of that statute, as it does to-day, the gist of the offense, something additional was required to render the offense indictable and punishable, and that was that some one or more of the conspirators should do an "act to effect the object of the conspiracy." This section while incorporated in a revenue act and contended at the outset to be limited to conspiracies against the revenue laws, was held by this Court not to be so limited.

In *United States vs. Hirsch*, 100 U. S., 33, Mr. Justice MILLER said :

"Looking then to the section in question which makes no mention of revenue whatever, but enacts in the most general terms a law against conspiracies, we are of the opinion that one of the other purposes of the act was to adopt this *general penal provision*, and that an offense punishable under that section alone is not a crime arising under the revenue laws; though the overt act necessary to be alleged may be one affecting the revenue of the United States." (Italics ours.)

Revised Statutes, Section 5440, is as follows :

"If two or more persons conspire either to commit *any offense against the United States* or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to the penalty of not less than one thousand dollars and not more than ten thousand dollars, or to imprisonment of not more than two years." (Italics ours.)

It is a compendious section and seems to prescribe a general rule in respect to conspiracies, and its departure from the common law is one of great significance. It ameliorated the

harsh rule of the common law which made the meeting of minds or the mere agreement punishable, though the purpose was abandoned before a step had been taken to carry in into effect.

It was said by Mr. Justice Woods in *United States vs. Britton*, 108 U. S., 204 :

"The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus poenitentiae*, so that before the act done either one or all of the parties may abandon their desire, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of conspiracy."

This section seems to have been intended to embrace every conceivable conspiracy to defraud the United States in any manner and for any purpose, and every conspiracy to *commit any offence* against the United States. It is practically a statutory definition of the crime of conspiracy under the Federal Laws and seems to be applicable to every case of conspiracy under such laws, unless the law creating the particular offence excludes by its language, expressly or by necessary inference, its application.

In *United States vs. Reichert*, 32 Fed., 142, which was an indictment for conspiracy to defraud the government, the question arose whether or not the indictment was defective for want of an averment of any act to carry the conspiracy into effect. The indictment was found under section 5438, Revised Statutes. It is as follows :

"Every person who enters into any agreement, combination, or conspiracy, to defraud the Government of the United States, or any department or officer thereof,

by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand dollars or more than five thousand dollars."

Mr. Justice FIELD and Judge SAWYER differed as to the necessity of alleging an act done to effect the object of the conspiracy. In sustaining the demurrer, Mr. Justice FIELD, said:

"The Circuit Judge is of opinion that the count is defective only in the last particular stated, namely, that it does not aver authority in the surveyor general to allow and approve the claim which was to be presented to him; and that where the charge is of a conspiracy to *defraud the United States*, by obtaining or aiding to obtain the payment or allowance of a false, fictitious and fraudulent claim, it is not necessary to aver the performance of any act in furtherance of the conspiracy. In this respect, I am unable to agree with him. I am of opinion that section 5440, Revised Statutes, amended by the act of May 17, 1879 (21 St., 4), qualifies the provision of section 5438; and that a conspiracy to defraud the United States or to commit any other offense against the United States, is not, of itself, an indictable offense, unless the conspiracy be followed by some act in furtherance of it—that is, to effect its object. Section 5440 applies to conspiracies to defraud the United States in *any manner or for any purpose*, and, of course, embraces the particular conspiracy mentioned in section 5438—to defraud the Government of the United States by 'obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.' As under section 5440, the conspiracy to defraud must be followed by some act to effect that object, to constitute a public offence, it would seem that, to the extent in which the section differs in that particular from the offence of defrauding the United States mentioned in the preceding section (5438), it must be held to qualify and amend that section. Were this not so we should have a general

provision that in case of a conspiracy to defraud the United States *in any manner or for any purpose*, it would be necessary to show the doing of some act to effect its object by one or more of the conspirators, to constitute the offence, with a previous provision that, in case of a conspiracy to defraud the United States *in a specified way*, there would be no necessity of showing any act to carry the conspiracy into effect. Consistency is given to the statute by treating the latter section as qualifying the preceding one." (Italics are the Court's).

It will be noticed that section 5438, upon which the indictment purported to be found, denounced any agreement, combination, or *conspiracy*, to defraud the Government, or any department or officer thereof, by obtaining the payment or allowance of any false or fraudulent claim, and prescribed a penalty. In other words, it was complete in itself, except that it did not come within what Mr. Justice FIELD seemed to consider to be the statutory definition of conspiracy against the United States contained in section 5440. It evidently was the policy of the Congress that no longer under Federal law should a *mere agreement* to do an act in violation of the laws of the United States be indictable. It was the clear and humane purpose of the act to afford an opportunity for repentance. There seems to be no theory upon which it can be successfully contended that it was the intention of Congress that this *principle* should not be found in the word "conspiracy" wherever used in the Federal statute.

It seems hardly conceivable that in legislating against conspiracy, Congress should have intended, by the Act of July 2, 1890, in respect of the offense of conspiracy to restrain or monopolize the trade and commerce of the United States, to return to the common law definition of conspiracy, which punished for a *mere agreement*. The word "conspiracy," in that Act, is not defined.

It would, but for Section 5440, and kindred legislation, have been inferred, the word being of settled legal significance at the common law, that it was used in its common law sense; but, as used in this statute, it would seem that it must be conceded to have been used, not with reference to its com-

mon law signification, but in the sense of conspiracy as defined by the Federal Statutes.

In the case of *United States vs. Kissel*, 218 U. S., 601, the indictment was for a conspiracy under the Sherman Act. It was therein alleged, as has been the practice in most of the Circuits, that acts were done by one or more or all of the conspirators to effect the object of the conspiracy.

In the opinion of the Court in that case, it is said by Mr. Justice HOLMES (p. 607):

“It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it.”

At the common law, it did exhaust it. Under Section 5440 it does not exhaust it, for something in addition to the unlawful agreement is required to make the offense indictable. In the Kissel case the agreement was held to be a continuing agreement; in other words, to be “a partnership in criminal purpose.” Without overt acts it could not continue, for the agreement could not be carried into effect at all without an act by some one or all of the conspirators to effect the object of the conspiracy; otherwise, it would be nothing more than a mere agreement.

Referring to the fact that conspiracy is a “partnership in criminal purposes,” Mr. Justice HOLMES pertinently adds (p. 608):

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"Every person who shall make any such contract, or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor," &c.

The words "contract," "combination" and "conspiracy" cannot be taken to be synonymous. It is conclusively presumed that each word was regarded as necessary to express the legislative intention. While it is true that "conspiracy" involves an agreement, and also involves a combination, there may be a contract and there may be a combination which is not a conspiracy. The conspiracy to make a contract in restraint of trade, the making of a contract in restraint of trade being an offense denounced, would seem necessarily to be brought under Section 5440 as a conspiracy to commit an offense against the United States. A conspiracy to enter into a combination in the form of a trust or otherwise in restraint of trade would seem also to be conspiracy to commit an offense against the United States and necessarily to be brought under Section 5440. In either case it would be necessary that the indictment should aver some act by one or more of the conspirators to effect the object of the conspiracy. A conspiracy to restrain, by any means, trade and commerce of the United States, is an offense against the United States.

It seems quite impossible to believe that Congress could ever have intended to accord a *locus penitentiae* in every case of conspiracy to commit any one of the long catalogue of offenses against the United States, involving varying degrees of moral turpitude, and have intended not to accord to the citizen prosecuted under the act to protect trade and commerce against unlawful restraints of trade and commerce the same opportunity for repentance.

We submit that the demurrer to the first and second counts should have been sustained.

II.

The Trial Court erred in overruling the motion of the Defendants at the conclusion of the entire evidence to direct a verdict in favor of the Defendants.

The 4th assignment of error, record page 36, is as follows :

“ Because the Court erred in overruling the motion of the defendants made at the conclusion of the entire evidence, for and in behalf of said defendants and each of them to direct a verdict in their favor and in favor of each of them—this motion being based upon the contention that no case has been made out against them and the jury was not warranted in finding against them or any of them.”

The motion to direct a verdict was based upon a familiar rule of law which was laid down by this Court in the case of *Commissioners, etc., vs. Clark*, 94 U. S., 278. Mr. Justice CLIFFORD, speaking for the Court, said, page 284 :

“ Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury ; but the modern decisions have established a more reasonable rule ; to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed (*Law. Rep. 2 Priv. Council App.*, 335 ; *Improvement Co. v. Munson*, 14 Wall., 448 ; *Pleasants v. Fant*, 22 *Id.*, 120 ; *Parks v. Ross*, 11 How., 373 ; *Merchants Bank v. State Bank*, 10 Wall., 637 ; *Hickman v. Jones*, 9 *Id.*, 201).”

This rule is applicable in criminal as well as in civil cases. In *Sparf vs. U. S.*, 156 U. S., 51 (a murder case), the

opinion of the court, by Mr. Justice HARLAN, states (pp. 99 to 100) :

"The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meagre as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury. *Pleasants v. Fant*, 22 Wall., 116, 121; *Montclair v. Dana*, 107 U. S., 162; *Randall v. Baltimore & Ohio R. R.*, 109 U. S., 478, 482; *Schofield v. Chicago & St. Paul Ry.*, 114 U. S., 615, 619; *Marshall v. Hubbard*, 117 U. S., 415, 419; *Meehan v. Valentine*, 145 U. S., 611, 625. The cases just cited were, it is true, of a civil nature, but the rules they announce are, with few exceptions, applicable to criminal causes and indicate the true test for determining the respective functions of court and jury. Who can doubt, for instance, that the court has the right, even in a capital case, to instruct the jury as matter of law to return a verdict of acquittal on the evidence adduced by the prosecution."

On account of the generality of the indictment the defendants made a motion for a bill of particulars (Record, p. 21). The Court granted the motion (Record, p. 25), and a bill of particulars was furnished, limiting by specific descriptions the charges in the first two counts of the indictment. The bill of particulars will be found on page 27 of the Record.

It is a settled rule of law that when a bill of particulars of charges in an indictment is ordered and furnished, the prosecutor is restricted in his proof to the matter set forth in the bill of particulars. The rule and the reason of it are stated as follows by Chief-Justice SHAW of Massachusetts in *Com. vs. Snelling*, 15 Pick., 321, 331 (an indictment for libel) :

"The general rule to be extracted from these analogous cases is that where in the course of the suit

from any cause a party is placed in such a situation that justice cannot be done in the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court in virtue of the general authority to regulate the conduct of trials has power to direct such information to be seasonably furnished and in an authentic form ; and that such an order may be effectual and accomplish the purpose intended by it the party required to furnish a bill of particulars must be confined to the particulars specified."

In *Com. vs. Giles*, 1 Gray, 466, 469 (an indictment for selling liquor), the Court said :

" When it (order for bill of particulars) is once made it concludes the rights of all parties who are affected by it ; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration."

Other authorities to the same effect are Bishop's New Criminal Procedure, 4th edition, Vol. 1, Sec. 643 ; Beale Criminal Pleading and Practice, Sec. 117. *Williams vs. Com.*, 91 Pa. St., 493, 502 ; *Reg vs. Esdaile*, 1 Fost. & F., 213, 228.

No direct evidence of any conspiracy between the defendants was introduced. The Government's evidence relates exclusively to the alleged doing of certain acts from which the jury were asked to infer the existence of a conspiracy. We propose now to take up in consecutive order the twelve specifications of unlawful competitive methods by which the indictment charges that the defendants were to effect the conspiracy set forth in the indictment, and modified by the bill of particulars, and to show that there is no evidence in the record from which the jury could reasonably conclude that the defendants conspired to do any of the things charged in the specifications as restricted by the bill of particulars.

1.

MANIPULATING PRICES.

INDICTMENT.

"Controlling, manipulating and arbitrarily bidding down and depressing in the market and market price of spirits of turpentine and rosin so that competitors and producers could not sell said articles of commerce except at ruinous prices."

BILL OF PARTICULARS.

"The Government expects to show that the controlling, manipulating and arbitrarily bidding down and depressing the market price of spirits of turpentine and rosin so that competitors and producers could not sell said articles of commerce except at ruinous prices was done at Savannah, Ga., Jacksonville, Fla., New York, N. Y., London and Liverpool, England, and Hamburg, Germany, and at divers other places at this time to the Assistant United States Attorneys unknown. The competitors affected by the prices so reduced were J. R. Saunders Co., Pensacola, Fla., J. Casey Co., New York, Jos. Conner & Sons, Baltimore, Md., Patterson Export Co., Jacksonville, Fla., and divers other persons at the present time to the Assistant United States Attorneys unknown. That the aforesaid manipulating, bidding down and depressing of prices was done by Edmund S. Nash, Spencer P. Shoter, J. F. Cooper Myers, Carl Moller, George Meade Boardman, Harry H. Bruen and divers other persons who were agents and employees of the American Naval Stores Company and subsidiary corporations, the names of whom and the exact nature and character of their agency and employment at the present time to said Assistant United States Attorneys are unknown."

There is no evidence in the record that the defendants or any of them conspired to or did control, manipulate or arbitrarily bid down and depress the price of naval stores at any of the places specified or elsewhere, or that any of the parties mentioned in the bill of particulars suffered from anything done by any of the defendants. This specification is entirely unsustained by the evidence.

2.

DIVERSION OF RECEIPTS.

INDICTMENT.

"Coercing and causing naval stores receipts which would normally and naturally flow to one port of the United States to be diverted to another port of the United States."

BILL OF PARTICULARS.

"The Government expects to prove that the diversion of naval stores receipts referred to in the second paragraph of the court's order was forced and coerced from the ports of Fernandina and Jacksonville, Fla., and Brunswick, Ga., to the port of Savannah, Ga., and that this was done by the defendants themselves and by divers agents of American Naval Stores Company and National Transportation and Terminal Company at this time to the Assistant United States Attorneys unknown. Further, that the naval stores thus diverted included both spirits of turpentine and rosin."

There is no evidence in the record that the defendants or any of them conspired to or did divert naval stores receipts or coerced and caused the same to be diverted from any of the ports specified to the port of Savannah. This specification is entirely unsustained by the evidence.

PURCHASING AT CLOSED PORTS.

INDICTMENT.

BILL OF PARTICULARS.

"Purchasing thereafter at divers times a large part of the supplies at naval stores ports known as closed ports and wilfully and with the deliberate intend and purpose of depressing the market refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market, where its purchases, if made, would tend to strengthen prices and the market therefor, the said Savannah market being the basis, or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulfport and Mobile on the basis of the market at Savannah."

A closed port, according to the Government witness, Patterson (record, p. 139), is a port where the receipts are not offered to all buyers, but where they are taken under contract on the basis of the Savannah market. The Government witness Barnes (record, p. 78) testified that Tampa, Pensacola and Fernandina are closed ports. The only evidence with regard to purchases of naval stores by the defendants at closed ports, and of their refraining from purchasing on the Savannah market, are the reports of the supervising inspectors of Georgia and Florida of purchases by the American Naval Stores Company at Savannah and at Jacksonville, during the months of January, February and March, 1908 (record, pp. 82 to 85, 227), and the testimony of the defendant Nash (Record p. 192). The Jacksonville purchases include purchases at Fernandina

and Tampa, and there does not seem to be any separation of the purchases in Fernandina and Tampa, which are closed ports, from the purchases at Jacksonville. Jacksonville is an open port (Record pp. 139, 194). The reports merely show that the Jacksonville purchases during the period mentioned were 11,332 bbls. of turpentine and 46,963 bbls. of rosin, and that the Savannah purchases during the same period were 2,066 bbls. of turpentine and 28,826 bbls. of rosin. The defendant Nash, President of the American Naval Stores Company, testified in regard to this specification as follows:

"Very often we did not buy in Savannah when we didn't want it; we also bought in Savannah when we did, and if we could. In regard to closed ports and our buying and not buying, as to what we did and why we did it, I think it would be obvious to the jury and to the court that in the ordinary course of business only certain quantities of rosin and turpentine are required for current demands, and if during any period to which the indictment refers, we abstained from buying in Savannah either rosin or turpentine it was for the good and sufficient reason that under the contracts that we had where we were enforced buyers, we were receiving at the closed ports all of the rosin and turpentine that was necessary for our daily and weekly requirements. That being the case there was no occasion or any reason of any sort why we should be compelled to buy in the market here."

There is no evidence at all of any wrongful purpose on the part of the defendants in making purchases at closed ports and in refraining from purchasing in Savannah. The Government seems to contend that the American Naval Stores Company was under an obligation of some sort to support the Savannah market, without reference to the requirements of its business. This is an amazing proposition. We submit that in making its purchases the American Naval Stores Company was free, under the law, to buy or to refrain from buying in any market according to its business judgment.

COERCING FACTORS.

INDICTMENT.

"Coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers, unless such contracts were entered into."

BILL OF PARTICULARS.

"The government expects to prove under Specification No. 4 of the court's order that the factors and brokers referred to were the Consolidated Naval Stores Company, West-Flynn & Harris Company and divers other factors and brokers at this time to the Assistant United States Attorneys unknown. Both parol and documentary evidence will be relied on by the government. The contracts relied on by the government in substance required the storage of the naval stores receipts of such factors and brokers at naval stores terminals owned, controlled or operated by the National Transportation and Terminal Company. Duplicates of these contracts the government is advised are now in the possession of defendants."

The evidence in support of this specification relates to a contract between the American Naval Stores Company and West-Flynn and Harris Company, dated June 1, 1907, and to a contract between the Paterson-Downing Company and S. P. Shotter Company, parties of the first part, and the Consolidated Naval Stores Company and others, parties of the second part, dated December 7, 1905. The date of the latter contract is prior to the incorporation of the American Naval Stores Company. A letter dated December 6, 1906, addressed by the S. P. Shotter Company to the Consolidated Naval Stores Company and signed by the defendant J. E. Cooper Myers, as vice-president of the Shotter Company, which was put in evidence by the government, contains the following statement :

"We beg to advise that the company has gone into liquidation, having sold its business in its entirety to

the American Naval Stores Company. We have transferred our contract with your good selves to the American Naval Stores Company, who will continue to act on the same lines as before " (Record, p. 220).

It therefore appears conclusively that the defendants did not coerce the Consolidated Naval Stores Company into *entering* into this contract. The contract with the West-Flynn & Harris Company is set out on page 219 of the record. It provides, in substance, that the West-Flynn & Harris Company shall place its Jacksonville receipts of rosin and turpentine on the yards of the National Transportation and Terminal Company and pay storage thereon, and that the American Naval Stores Company shall bid for the receipts of the West-Flynn & Harris Company and purchase the same if its bid is accepted, its bid to be accepted if equal to that of any other purchaser. It is also provided that the West-Flynn & Harris Company need not transfer its water receipts to the yards of the National Transportation and Terminal Company if it pays the American Naval Stores Company a lump sum of \$400 for the business of the first year. The Government's witnesses West (p. 66), Richmond (p. 74) and Harris (p. 75), and the defendants Nash (p. 184) and Shotter (pp. 196-199) testified in regard to the circumstances in which this contract was made. The testimony shows that the American Naval Stores Company refused throughout the month of May in 1907 to bid for the receipts of the West-Flynn & Harris Company at Savannah and Jacksonville, unless that company would transfer the receipts sold to the American Naval Stores Company at Jacksonville to the yards of the National Transportation and Terminal Company and pay initial storage thereon, as provided in the contract afterwards entered into. The managers of the West-Flynn & Harris Company regarded the American Company as an important customer, and finally, after trying without success to eliminate some of the terms, entered into the contract containing the provisions required by the American Company. The Government's witnesses testified that no discrimination was made against them and that, after the contract was made, the relations of the two companies were pleasant and satisfactory. At the time when the contract was made, Harris says that

Shotter told him that he required the same contract from other factors, and desired to treat all factors alike (Record, p. 77).

The reason for the policy of the American Company in requiring the West-Flynn & Harris Company to enter into the contract is given by the witnesses Nash and Shotter in their testimony (Record, pp. 184, 188, 197).

The National Transportation and Terminal Company, of which all the stock was owned by the American Naval Stores Company, had yards at Jacksonville. The Atlantic Coast Line also had storage yards at Jacksonville. Initial storage rates were charged when receipts were placed on the yards, and at the expiration of thirty days renewal rates were charged. The American Company wished to get all the revenue possible for the yards of its subsidiary company. It did not wish to purchase receipts stored on another yard and be subject to the payment of renewal charges. It was also necessary, when naval stores were exported from Jacksonville, to ship them first by rail to Fernandina, because there was no deep water at Jacksonville, and revenue was needed to offset the cost of transportation to Fernandina. For these reasons, the American Naval Stores Company deemed it necessary to require all factors from whom they purchased naval stores at Jacksonville to place the stores on the yards of the National Transportation and Terminal Company. The West-Flynn & Harris Company certainly was not coerced into making the contract. The government witnesses themselves state that no threats were made by the representatives of the American Naval Stores Company (Record, pp. 71, 76). They were simply offered the option of selling their receipts to the American Naval Stores Company and placing such receipts sold at Jacksonville on the yards of the National Transportation and Terminal Company, or of losing the American Naval Stores Company as a customer. They voluntarily chose the former course.

In *Radich vs. Hutchins*, 95 U. S., 210, it appeared that the plaintiff in 1864 was the owner of 450 bales of cotton in the State of Texas, which he wished to export. The defendants, who were officers of the Confederate Army, had prohibited the exportation of cotton from the State, except upon

the condition that the person desiring to export should sell to them an equal amount of cotton for the benefit of the Confederate States. The plaintiff, desiring to export his cotton, but fearing to do so without complying with the condition imposed, sold one-half of his cotton to the defendants at a nominal price as a consideration for a permit to export the other half, but stipulated that he should have the privilege of redeeming the bales sold upon the payment of such sum as the defendants might demand. Afterwards he did redeem this cotton by paying the defendants \$13,357.

The action was brought to recover this sum, on the ground that it had been exacted by coercion and duress. Judgment for the defendants was affirmed, on the ground that the payment was voluntarily made in the course of an illegal transaction. The Court by Mr. Justice FIELD said (p. 213):

“ To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary—treating now the redemption of the cotton as made in money, goods being taken as equivalent for a part of the amount—there must be some actual or threatened exercise of power possessed, or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is that a ‘ payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.’ *Mayor & City Council of Baltimore vs. Lefferman*, 4 Gill (Md.), 425; *Brumagim v. Tillinghast*, 18 Cal., 265; *Mays v. Cincinnati*, 1 Ohio St., 268. Tested by these cases the allegation of coercion or duress becomes frivolous. It is plain that the plaintiff entered voluntarily upon the negotiation with the defendants, and subsequently paid the redemption money without any constraint which would in law change the voluntary character of the payment. Such being the case the transaction is one which is fatally tainted.”

In *Radich vs. Hutchins* there was no coercion because the plaintiff was free to export his cotton upon the terms imposed or not, as he chose. He made the application to the Cotton Office. So in case of the contracts referred to in this specification. The factors were free to enter into them or not as they chose, and they voluntarily applied to the American Company to make the contracts with them. We submit that the allegation of coercion is frivolous.

5.

CIRCULATING FALSE STATEMENTS.

INDICTMENT.

"Circulating and publishing false statements as to naval stores production and stocks in hand of producers and their immediate representatives."

BILL OF PARTICULARS.

"The Government expects to prove under the fifth specification of the Court's order that false statements were made by the defendants themselves as to the stock of naval stores unsold in the hands of the producers or their immediate representatives; that is to say, that the defendants inspired and caused to be published in the Naval Stores Review and various other trade organs at this time to the Assistant United States Attorneys unknown, and circulated throughout the naval stores trade in various issues of those trade organs, statements grossly exaggerating the quantity of spirits of turpentine in the hands of producers or their immediate representatives and in storage in Savannah, Ga., Fernandina and Jacksonville, Fla."

This specification was abandoned by the government and was withdrawn from the consideration of the jury by the Court (Record, p. 60).

ISSUING FRAUDULENT WAREHOUSE RECEIPTS.

INDICTMENT.

"Issuing and causing to be circulated and hypothecated fraudulent warehouse receipts."

BILL OF PARTICULARS.

"Under the sixth specification of the Court's order the Government expects to show that the warehouse receipts referred to were in substance and character receipts issued by the National Transportation and Terminal Company for naval stores falsely claimed to be in its custody at Tampa, Fernandina and hypothecated with the banks at Jacksonville; that said warehouse receipts were partly printed, partly written. No such receipts are in the possession of the Government or exemplifications of the same, but it is believed by the Government that these receipts are in the possession of the defendants or have been by them destroyed."

This specification was abandoned by the government and was withdrawn from the consideration of the jury by the Court.

FRAUDULENTLY RAISING GRADES OF ROSINS AND FALSELY GAUGING TURPENTINE.

INDICTMENT.

"Fraudulently grading, re-grading and raising grades of rosins and falsely gauging spirits of turpentine"

BILL OF PARTICULARS.

"Under the seventh specification of the court's order, the government expects to prove that the practice of fraudulently and falsely rais-

ing the grades of rosin without reinspection was carried on at Brooklyn, N. Y., Hamburg, Germany, Tampa, Fla., Jacksonville, Fla., Ludlow, Ky., East St. Louis, Ill., and divers other places at this time to the Assistant United States Attorneys unknown. This grading up of rosin the government expects to show was done by the employees of National Transportation and Terminal Company and the American Naval Stores Company, acting under the direction of the respective managers of said companies' terminals at the points named and by divers other agents and servants of all of said defendants, the exact names and character of said agencies being at this time to the Assistant United States Attorneys unknown."

We discuss separately the evidence relating to fraudulent raising of grades of rosins and the evidence relating to false gauging of spirits of turpentine.

(a) Raising Grades of Rosins.

The only evidence in regard to the raising of grades of rosins was given by certain former employees of the National Transportation and Terminal Company of New York and by a few customers of American Naval Stores Company, who testified that rosin delivered to them was not in all cases up to the grade they had ordered. The National Transportation and Terminal Company of New York is not a defendant. Its stock is owned by the American Naval Stores Company of New York, whose stock is in turn owned by the defendant American Naval Stores Company of West Virginia (Record, p. 188). *There is no testimony that grades of rosin were raised at any point mentioned in the bill of particulars except at Brooklyn, New York, on the yards of the National Transporta-*

tion and Terminal Company of New York. The rosin alleged to have been raised in grade belonged to the American Naval Stores Company of New York, which is not a defendant to this indictment (Record, p. 161). Five witnesses—O'Keefe (Record, p. 85), Mahoney (Record, p. 96), DeGroot (Record, p. 91), Clehan (Record, p. 95), and Hill (Record, p. 216)—testified as to the raising of grades at Brooklyn. O'Keefe was foreman at the Brooklyn yards, the others were workmen under him. They were hostile witness. All except O'Keefe went out on a strike in the spring of 1908. O'Keefe left at the same time because his superiors, instead of allowing him to manage the strike, called in people from outside (Record, p. 91). Their testimony was that the yard had received while they were employed there about 150,000 barrels of rosin, of which 50,000 or 60,000 barrels approximately were raised in grade without reinspection. Under the terms of the bill of particulars the Government was bound to prove that the raising of grades was done without reinspection. All of the workmen who testified as to the raising of grades admitted that there had been reinspection of a large number of barrels before the grades were changed. Their testimony as to reinspection was contradictory. O'Keefe said (Record, p. 88):

“The raising of grades continued five or six months before the inspector even made a pretence of inspecting. For the first five or six months no head was taken out at all.”

DeGroot, on the other hand, said (Record, p. 93):

“In the beginning they sampled everything that come in, but in the latter end they did not sample at all.”

Mr. Dill, the manager of the American Naval Stores Company of New York, which owned the rosin stored on the Brooklyn yards to which the testimony with regard to the raising of the grades relates, testified that it was the practice of the Company to reinspect all their rosins which came in from the South. All their rosin was sold on the basis of New York inspection, and not of Southern inspection, with a New York guarantee (Record, pp. 162, 166). Mr. Dill's orders were to have everything inspected so far as

possible 100 per cent. and always at least 10 per cent. (Record, p. 162). He said that in the year April 1, 1907, to April 1, 1908, about 150,000 barrels of rosin were received at the Brooklyn yard, of which 42,500 barrels were regraded (Record, p. 162). Mr. Dill produced the original memoranda of inspection made by Mr. Smith, the inspector, during the year in question, and stated that they represented the quantity of rosin mentioned by him and covered the period that he testified about (Record, p. 172). On page 218 the record states :

"When the witness C. W. Dill was recalled by the defendants the testimony as to the slips and reports mentioned these were turned over to the attorneys for the Government for examination, but they were not introduced in evidence."

The inference clearly is that the slips showed the correctness of Dill's testimony. Mr. Charles E. Smith, a witness for the Government and the inspector who inspected the rosin on the Brooklyn yards, corroborated Mr. Dill. He stated (Record, p. 81):

"If I had 500 barrels I am supposed to go through the whole of them, sometimes I only take ten per cent., and grade the samples therefrom with these types."

And again, at the bottom of page 81 :

"It is a fact that all over the world where rosin is sold it is sold according to this standard type. Q. So that it does not make any difference what the inspection done in Jacksonville, or here in Savannah, is, when it comes to be sold it is sold by this standard type, that is a fact? A. Yes, sir. It follows that if it is found a barrel of rosin grades a low grade by the actual type, it is so sold in the market according to this type, without reference to what the grade in Florida or Georgia was; just as I find it I sample it. The way I understand it is that it is sold that way and the seller is not bound by the previous inspection, nor is the buyer bound by it, but it is sold according to the standard type which I furnish to the trade."

The Government's witnesses Post (Record, p. 107), Sercomb (Record, p. 109), Berghoff (Record, p. 129) and Austin (Record, p. 145), who were customers for rosin of the American Naval Stores Company, testified that during the period covered by the indictment they found that rosin delivered to them was lower in grade than the grade they had ordered. Post's testimony referred to 100 barrels and Berghoff's to 25 barrels. Sercomb did not know how many barrels he had purchased from the American Naval Stores Company, but said that his requirements for the year were only 120 barrels. Austin said that during the year 1907 his company purchased approximately 2,200 barrels of rosin from the American Naval Stores Company, but did not know how many of the barrels were deficient in grade. He testified to reclamations from time to time of from two or three to possibly a dozen barrels. The complaints of these witnesses were based upon their own inspection. They did not claim to be experts and the types which they used were not fresh. According to the testimony of the Florida inspector, Parker (Record, p. 101), and the Georgia inspector, Register, (Record, p. 137), accuracy of inspection depends upon the experience and skill of the inspector. It is largely the result of his individual judgment. Different inspectors may differ as to the grade of the same rosin. The American Naval Stores Company had 4,000 customers (Record, p. 199), and during 1907 handled 1,325,000 barrels of rosin (Record, p. 184). Mr. Shotter testified (Record, p. 199) that the Company rarely ever has a complaint. This statement is corroborated by the record. Only four customers of the American Company testified as to dissatisfaction with the rosin sold to them by the American Company and in regard only to a very small number of barrels. No attempt was made to connect any of the defendants in any way with the grading up of rosin on the Brooklyn yards, or to show that any of them knew that any rosin had been raised in grade without reinspection. The defendants Nash (Record, p. 181), Shotter (Record, p. 201) and Boardman (Record, p. 154), positively denied knowledge that such a thing had been done.

No testimony was offered to show that any competitor of the American Company was injured by the alleged raising of grades in Brooklyn. The Government's witnesses Martin (Record, p. 131) and Patterson (Record, p. 140) only stated

their opinions on the hypothetical resulting injury to competitors. Martin testified that a shipment of rosin by the Patterson Export Company, one of the American Company's competitors, was refused on the ground that the rosin was not up to grade, and he admitted that the grade marks on the barrels had been erased and that higher grades were substituted for lower grades (Record, p. 134). See also the testimony of Patterson in regard to this shipment (Record, p. 141).

We submit that the evidence given by the Government witnesses under this specification Seven falls far short of proving the practice of fraudulently and falsely raising the grades of rosin without reinspection and that no proper inference could be drawn by the jury from this evidence that the defendants had engaged in a conspiracy to restrain or monopolize interstate and foreign trade in naval stores.

The evidence itself refutes the inference which the prosecutor seeks to draw from it. The record shows that in 1907 the American Naval Stores Company dealt in 1,325,000 barrels of rosin, supplying 4,000 customers. It further shows that only four small and relatively very unimportant customers were found to testify that the rosin delivered to them was in some cases not up to the grade ordered. This testimony was based confessedly upon inadequate inspection by men who were not experts under conditions incompatible with accuracy. It also abundantly appears that the Government, aided by hostile competitors, made a thorough canvass of the customers of the American Naval Stores Company throughout the country in its search for evidence. See testimony of Martin (Record, p. 129), Patterson (Record, p. 137) and Coachman (Record, p. 146). Martin, a detective for the Government and one of its chief witnesses, previously to being employed by competitors of the American Company had been in the employ of the S. P. Shotter Company, one of the companies which was merged in the American Naval Stores Company, and during his service took a complete list of the customers of the Shotter Company, which was at his disposal in working up the case against the American Company (Record, pp. 132, 133). The result of this formidable preparation of the case was the testimony of the four small customers referred to. *Montes parituriunt, nascitur ridiculus mus.* O'Keefe testified (Record, p. 88) that the rosin sold to Proctor & Gamble and to Babbitt & Co. was raised one grade. Yet there is in the record no evi-

dence of dissatisfaction on the part of these large customers. Shotter (Record, pp. 199 to 200) gives the names of some of the largest buyers of rosin from the American Company, soap manufacturers, varnish manufacturers, etc. None of these customers appeared to testify that they had not received the grade of rosin for which they bargained. We have referred to Dill's testimony, which is not controverted, that sales of rosin by the American Naval Stores Company of New York were made on the basis of New York inspection, and that the grades were guaranteed by the Company. The Company was prosperous and solvent. What motive was there for fraudulent raising of grades when the grades were guaranteed and the Company would be required to make good any defect in quality? Is it conceivable that great manufacturers purchasing large quantities of rosin of specified grades for use for specific purposes would fail to detect the substitution of inferior grades? The failure of the large purchasers and consumers of rosins to complain shows that no deception or fraud was practiced upon them.

Moreover, the impolicy of such dealing is so obvious that it is in the highest degree improbable that able managers of a long established and successful business would have permitted it. The certain consequence, in the long run, would have been to drive away customers and to benefit honest competitors. The manager of the Company which is charged with being guilty of these frauds, Dill, testified as follows: "I have had complaints from some as to rosin at various times since I have been in business, but they were a very small affair, but I have never lost a customer on account of any complaint. If there was any it was adjusted, and they have been very infinitesimal indeed" (Record, p. 165).

(b) False Gauging.

There is no evidence in the record of false gauging of spirits of turpentine. The Government's witness, Hoskins, a negro who was employed as a workman on the yards of the National Transportation and Terminal Company at Jacksonville, testified that by order of Woods, the custodian of the yards, he used to take out from half a gallon to a gallon of turpentine from barrels, after the inspectors had turned them over to the American Naval Stores Company (Record, p. 115).

Hoskins was discharged according to his own testimony for fighting; but according to the superintendent of the yards, Tison, he was discharged for drawing another man's money on a forged order, and the fight was with the man whom he tried to rob after Hoskins had been discharged and made to return the money (Record, pp. 175-176).

Another government witness, Wilson, who was also employed on the yards of the National Transportation and Terminal Company at Jacksonville, testified that "when barrels of turpentine came in from the producers and after they had been inspected by the state inspector we called what we did regulate 'em. We took some out of the barrels, out of all of them about half a gallon when we got them. The spirits that we took out of the barrels we put in another barrel" (Record, p. 143). This testimony, however, does not corroborate Hoskins. It merely describes a recognized custom in the treatment of turpentine. The witness Register, the official inspector of naval stores in Georgia, testified as follows (Record, p. 171):

"Meaning by regulate to take some turpentine out of barrels and to put some in if necessary, I know that the custom in Savannah is to regulate the stuff, some cases to take out and some to put in after the buyers get charge of them, after the inspector has finished with them."

(Record, p. 171).

See also the testimony of Elson (Record, p. 174) and of Tison (Record, p. 175).

The acts so testified to cannot properly be described as falsely gauging spirits of turpentine, and the evidence does not sustain this specification of the indictment. Gauging is defined in Webster's International Dictionary "to measure or to ascertain the contents or the capacity of, as of a pipe, barrel or keg." See also the description of gauging by the Government's witness Parker (Record, p. 102). Taking turpentine out of a barrel is not falsely gauging the turpentine.

The testimony of the Government's witness Hoyt (Record, p. 112) and of Hoskins (p. 116) in regard to the installation of a fifty-five gallon turpentine tank fitted with a small steam coil entirely fails to show that anything wrongful was done or intended. It appears from Moller's testimony (Record, p.

177), which is not controverted, that the tank was installed for the purpose of making an experiment to determine the variation of turpentine by expansion through heat. The experiment was made one day, and that was the only time that the steam coil was ever used. This testimony is corroborated by the witness Tison (Record, p. 175).

The defendant Moller, who was the general manager of the National Transportation and Terminal Company in Jacksonville, denied that turpentine was taken out of barrels on the yards there, and showed the entire absence of any motive for the American Company to take out turpentine by testifying that out of 83,879 barrels of turpentine shipped from the yards of the National Transportation & Terminal Company in Jacksonville during the period covered by the indictment, *all but 895 barrels were sold by weight or regauge at the point of destination* (Record, p. 177).

The testimony of the Government's witness Wagner (Record, p. 121) that there was a shortage of 30 gallons in 50 barrels which John A. Casey Company of New York purchased from the American Naval Stores Company in November, 1907, is wholly inconclusive. The alleged shortage was determined by gauging at the place of business of the Casey Company. Wagner admitted that turpentine leaks from the packages and evaporates. He said (Record, p. 123):

"I believe that the difference of a quart or two quarts may very well take place in the gauging by reason of the adjustment of the dip-rod and the angle perhaps at which the party adjusted it and in the reading of it."

Hart, who was called to corroborate Wagner, failed to do so. He said (Record, p. 124):

"I know that turpentine is easy to escape, difficult to retain, the barrels must be perfect and very right and that the interior of the barrels is glued. I saw only 16 or 18 barrels and they had been gauged before I saw them. I do not know whether they contained one gallon or half a gallon or a quart or a pint less than the gauging marked."

It is very significant that the Government found only one customer of the American Company to testify as to a shortage amounting to only 30 gallons of turpentine. During 1907 the American Company handled 284,000 barrels of turpentine (Record, p. 184).

We submit that the testimony as to the treatment of turpentine in the Jacksonville yards wholly fails to prove the charge of false gauging.

8.

ATTEMPTING TO BRIBE EMPLOYEES OF COMPETITORS.

INDICTMENT.

"Attempting to bribe employees of competitors and factors so as to obtain information as competitors' business and stocks."

BILL OF PARTICULARS.

"Under the eighth specification of the Court's order the Government expects to prove that some of the competitors in business whose employees were attempted to be bribed were the John R. Young Company and the Naval Stores Export Company, and that the names of some of the employees of said competitors who were approached with bribes were F. H. Holloway, Harry Manuey and William Thomas; that the names of the persons attempting to bribe the above named employees of said competitors were A. C. Bacon, Henry Betjeman and Percy Bacon, and that these attempted bribes occurred at Tampa, Florida, Fernandina, Florida, and Brunswick, Georgia; that the Government in this connection expects to show the attempted bribing of divers other employees of divers other competitors by divers other agents and employees of the defendants at divers times and places at this time to the Assistant United States Attorneys unknown."

This specification was abandoned by the government and was withdrawn from the consideration of the jury by the Court.

9.

INDUCING CONSUMERS TO POSTPONE DATES OF DELIVERY.

INDICTMENT.

"Inducing consumers by payment of bonuses and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases, would tend, if made, to strengthen the market prices."

BILL OF PARTICULARS.

"Under the ninth specification in the order of the Court, the government expects to prove that for the postponement of deliveries while defendants were depressing the market Lilly Varnish Company, of Indianapolis, Ind., Gesellschaft Schering, of Berlin, Germany, and Conrad William Schmidt Dueseldorf, were offered bonuses, and in order to force the postponement of deliveries at such times Ernest C. Bartels, Aktien Gesellschaft, Hamburg, Germany, was threatened with boycott. Payment of bonuses and threats of boycott were made to and against divers other consumers to the assistant United States Attorneys at this time unknown. The payment of said bonuses and the threats of boycott were made by the defendants and by their special agent E. S. Trosdal and the manager of the Cincinnati, O., branch office of the American Naval Stores Company, and by other agents and representatives whose names and exact relations to said defendant are to the Assistant United States Attorneys unknown. The government is not in possession at this time of the contracts described in said specification,

except the contract between the American Naval Stores Company and Lilly Varnish Company, a copy of which in substance is as follows :

' Date, FEBRUARY 12, 1907.

American Naval Stores Company, Chicago, Ill.

Sold to Lilly Varnish Co., Indls., Ind., freight prepaid to Indls., Ind. Ship via Penna. Co. when ordered. Terms sight draft with bill of lading attached upon shipment of goods. This order not subject to cancellation.....bbls.
-----Rosin-----per 283 lbs.
2-6500 gallon tanks turpentine to be billed at flat Savannah rate paid to Indls. These tanks to be taken before Dec. 31, 1907. Sight draft B. of L. attached.

AMERICAN NAVAL STORES CO.

By W. E. HOLMES.

Accepted,
CHAS. LILLY,'

but it is advised and believed that defendants have in their possession duplicates of these contracts."

This specification as defined by the bill of particulars is wholly without support from the evidence. No attempt was made to show that bonuses were paid to any consumer or that threats of boycotts were made against any of them to induce them to postpone dates of delivery of contract supplies. The testimony of one witness only, Charles Lilly (Record, p. 124), has any bearing on the matters charged in the ninth specification. From his testimony it appears that in May, 1907, the Lilly Varnish Company contracted for two tank cars of turpentine at Savannah price which was then 60 to 61 cents per gallon. There was a delay in forwarding the shipments owing to a freight congestion on the railroads, and the market for turpentine declined to 57 cents per

gallon. The Lilly Company complained and finally cancelled its contract by telegram. One car, however, had started before the telegram of cancellation was received by the American Company. The matter was finally adjusted by Lilly Company taking one car at 60 cents per gallon, being a deduction of \$99 from the contract price, and by the American Company cancelling the contract for the other car. Here was no bonus, no threat of boycott, no postponement of date of delivery.

10.

MAKING TENTATIVE OFFERS.

INDICTMENT.

"Making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contracts for small quantities and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers."

BILL OF PARTICULARS.

"Under the tenth specification in the court's order, the government expects to prove tentative offers of spirits of turpentine made to Ernest C. Bartels Aektien Gesellschaft, Hamburg, Germany, by the following representatives of American Naval Stores Company, to wit, the American Pine Products Company and Hugo Wirtz and divers other tentative offers of naval stores made by the American Naval Stores Company to parties and at places at this time to the Assistant United States Attorneys unknown."

There is no evidence in the record to sustain this specification and the bill of particulars thereof. The only evidence relating to a tentative offer is that of Graves (Record, p. 104) and Fletcher (Record, p. 180). From this testimony it appears that Mr. Fletcher of the Philadelphia office of the American Naval Stores Company frequently made tentative offers of rosin to Mr. Graves. A tentative offer, as stated by the witnesses, is an offer to sell, if at the time the offer is accepted the party making the offer has on hand the goods in the quantity and of the quality offered

(Record, p. 105). It therefore often happened that when Mr. Fletcher's offers were accepted he could not make delivery because he did not then have the rosin on hand. Mr. Graves perfectly well understood that the tentative offers were not firm offers, and that he could not count on delivery. The tentative offers testified to do not resemble those described in the specification. There was nothing wrong about them, and they do not indicate any purpose to violate the Sherman Act.

11 and 12.

SELLING ROSIN AND TURPENTINE BELOW COST AND FIXING THE
PRICE OF TURPENTINE BELOW COST OF PRODUCTION.

INDICTMENT.

"At divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors."

"Wilfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production."

BILL OF PARTICULARS.

"Under the eleventh and twelfth specifications in the order of the court, the government expects to prove that in the months of November and December, 1907, the American Naval Stores Company at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by the manager of the New York City office of the American Naval Stores Company, and at Philadelphia, Pa., by the manager of the Philadelphia branch office of the American Naval Stores Company, and divers other sales made at divers other places and at divers other times to consumers and by representatives of the American Naval Stores Company at this time to the Assistant United States Attorneys unknown. The prices at which said sales were made were based on the prevailing Sa-

vannah market at those times depressed below the cost of production by the defendants by the various means and in the manner specified in the first and second counts of the indictment."

No evidence will be found in the record to support these specifications. There is no evidence of any sales of turpentine by the American Company at the places and at the times mentioned. The Government did no more than to introduce evidence of the cost of production of turpentine during the period covered by the indictment and the prices of turpentine during that period on the Savannah market.

It would be preposterous to infer from the fact that turpentine in 1908 sold below the cost of production that this must have been the result of a conspiracy on the part of the defendants to this indictment. In view of the absence of any other evidence to support such a theory, and in view of the testimony of Nash as to overproduction of naval stores in 1907 (Record, pp. 181-182), and of the known fact of the panic which occurred in 1907 and the subsequent depression in the prices of all products, it is obvious that the jury should not have been permitted to draw such an inference.

III.

The Charge of the Trial Court.

The assignments of error with regard to the charge of the Court will be found on pages 37-46 of the record. The instructions given to the jury to which exceptions were taken, and the exceptions, will be found on pages 59-64.

The general ground upon which we urge that all the exceptions to the charge as given should be sustained is that there was no evidence which warranted the instructions excepted to, and that the jury was misled thereby, and induced to make speculative inferences from the evidence. This is certainly reversible error. The

rule upon this subject always adhered to by this Court is stated as follows by Chief Justice TANEY in *U. S. vs. Breilling*, 20 How., 252, 254-255 :

"It is clearly error in a Court to charge upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction pre-supposes that there is some evidence before a jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the testimony."

In *Parks vs. Ross*, 52 U. S., 361, the Court by Mr. Justice GRIER said (p. 372) :

"A jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is therefore error in the Court to instruct the jury that they may find a material fact of which there is no evidence from which it may be legally inferred."

Among the many cases in which this rule has been applied by this Court we refer to the following :

Goodman vs. Simonds, 20 How., 343, 359.

Etting vs. U. S., 11 Wheat., 59, 75.

Michigan Bank vs. Eldred, 9 Wall., 544, 554.

Insurance Co. vs. Baring, 20 Wall., 159, 161.

The analysis of the evidence which we have already made shows the absence of any basis for the instructions of the trial Court to which exceptions were taken. A strikingly glaring instance of error is covered by the 34th assignment of error (Record, p. 44). The instruction referred to is as follows (Record, p. 61) :

"One of the means charged is the coercion of factors and brokers into entering into certain contracts,

which you will recall. It will be well for you to understand the legal meaning of coercion. The word coerce means to restrain, by force, especially by law or authority, to repress ; in the sense which now prevails it differs little from the word compel, yet there is a distinction between them, coercion being usually accomplished by indirect means as threats, intimidation, physical force being more rarely used in coercion. It imports, however, some actual or direct exercise of power possessed or supposed to be possessed by the party who, it is claimed, so acted."

There is not even a scintilla of evidence in the record showing coercion in the sense defined by the Court.

Some of the instructions given are erroneous on other grounds as well.

The instruction referred to in the 26th and 27th assignments of error (Record, p. 42) is as follows (Record, p 59):

"A business corporation like the American Naval Stores Company has a perfect right to buy when and where it pleases, and to refrain from buying when and where it pleases. It has a perfect right to refuse to enter into contracts if it does not wish to do so. It has a perfect right to select its own customers and to refrain from dealing with people that it does not for any business reason care to deal with. Its failure to buy from a competitor may cause the competitor to fail, but the law does not attempt to prevent anything of the kind. The Constitution of the State guarantees to traders the liberty of contract."

The Court gave this instruction but with the following qualification:

"This is true provided—this is the qualification which the Judge gives you: This is true provided that such corporations do not violate the *interstate law or statute* as I have explained to you in my general charge." (Italics ours.)

The qualification of the Court is utterly vague and misleading to the jury. The "interstate law or statute" is an expression applicable to many laws besides the Sherman act.

The instruction referred to in the 39th assignment of error (Record, p. 45) is as follows (Record, pp. 62, 63):

"Evidence has been introduced to the effect that two other corporations which are distinct from the defendant companies, existed in the State of New York at the time of the alleged acts. The defendant companies are the American Naval Stores Company of West Virginia and the National Transportation and Terminal Company alleged to be organized under the laws of New Jersey. The New York corporations were known as the American Naval Stores Company of New York and the National Transportation and Terminal Company of New York. Evidence has been introduced as to certain transactions or acts occurring on the yards in Brooklyn, N. Y., of this Transportation and Terminal Company of New York. The witness O'Keefe testified that he was employed by the American Naval Stores Company, and other witnesses testified that they worked at the yards in question. The witness Dill testified that he was the President of the National Transportation and Terminal Company of New York and the manager of the America Naval Stores Company of New York, and that he employed O'Keefe for the National Transportation and Terminal Company of New York, and that the yards belonged to the National Transportation and Terminal Company of New York. You have heard the evidence as to the ownership of the rosin which entered this yard. If you find that the acts alleged by certain employes were done by employes of the New York corporation, and that these corporations were separate and distinct from the two defendant corporations, and that such New York corporations did not conspire with either of these corporations as charged, with two or more of the defendants, then you should not consider any of the acts which are charged to have occurred on the properties of these New York corpora-

tions, or the acts of employees or agents thereof, but if, on the other hand, the evidence satisfies you beyond a reasonable doubt that one or both of the New York corporations was, in fact, so owned, controlled, dominated and operated by one or both of the defendant corporations, that it had the same officers, and it was, in fact, in its business transactions for all practical purposes identical with one or both of the defendant corporations, the New York corporation which you find so connected you may consider in connection with the defendant. If you then further find that two or more of the defendants conspired as charged with one or both of the New York corporations to monopolize and restrain interstate trade and commerce, you would be authorized to find a conviction as to such defendants, or if you find that the employees or agents of such New York corporations were, in fact, as I have stated, employees or agents of one or both of the defendant corporations named in this indictment and such corporations, if you find them so identical, would be responsible for the acts of such employee or employees if they authorized them or if they clearly ratified them such wrongful acts, subsequently knowing them to have been committed. But you must consider this evidence in connection with all the other evidence in the case, that is, whether there was any conspiring between any two of the defendants with either or both of the New York corporations or their agents or whether said New York corporations or their agents or employees were dominated, directed and controlled by any two of the defendants, and that such acts or means alleged to have been committed at the Brooklyn yards were ratified by any two or more of the defendants."

This instruction is bad in several ways. It is so unprecise, so far from clear in meaning as to be misleading to the jury. Furthermore, it was erroneous to let the jury decide whether one or both of the New York corporations was identical with one or both of the defendant corporations. One corporation cannot, in a legal sense, be identical with another

corporation (*U. S. vs. Delaware & Hudson Co.*, 213 U. S., 366).

It was also erroneous to leave to the decision of the jury whether the acts committed at the Brooklyn yards were ratified by any two or more of the defendants when there was no evidence whatever in the record of any such ratification.

The instruction referred to in the 40th assignment of error (Record, p. 46) is as follows (Record, p. 63) :

"The conspiracy, the venue of this offense, will be where the conspiracy was formed; but a conspiracy may be formed by individuals residing in different States, or it may be carried from one district to another, if the objects and purposes of that conspiracy has means for transporting or been committed in another district than that—which it was formed."

If these defendants were entitled upon the subject of venue to an intelligent and intelligible instruction the foregoing is certainly defective.

IV.

Exceptions to the Admission of Evidence.

The assignments of error numbered 41 to 49 inclusive (Record, pp. 46, 47) relate to evidence which we contend was improperly admitted, and to the admission of which exceptions were duly taken. In our argument concerning the motion to direct a verdict we have discussed the evidence referred to in these assignments of error. We respectfully submit that the exceptions to the admission of this evidence should be sustained.

V.

The judgment of the Circuit Court of Appeals should be reversed.

Some of the assignments of error have not been considered in this brief because they have been so fully and ably argued in the brief of associate counsel.

It is respectfully submitted that, by reason of the errors urged in the brief of associate counsel as well as those urged herein, the judgment of the Circuit Court of Appeals should be reversed.

JOHN C. SPOONER,
GEORGE RUBLEE,
Of Counsel for the Petitioners.

No. 842.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

EDMUND S. NASH ET AL., PETITIONERS,

v.

THE UNITED STATES.

*PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR THE UNITED STATES IN OPPOSITION.

The Government submits that the petitioners have not stated a case entitling them to the issuance of the writ. They have not suggested any distinct question of law hitherto undecided and requiring the decision of this court. Therefore the writ should be denied.

ARGUMENT.

I.

As to the penal provisions of the statute.

In the absence of any grave question of law requiring the decision of the court the contention of the defendants (petition, paragraph I, p. 3, and paragraph IV, p. 4) that this court should issue the writ

for the reason that two of the defendants are the first men sentenced to imprisonment for violation of the Sherman Act is not entitled to serious consideration. From the failure of Congress to grant in criminal cases arising under the Sherman Act a right of appeal to this court from the Circuit Courts of Appeals, it is to be presumed that Congress intended that persons convicted under the Sherman Act should have only such rights of review by this court as are given to persons convicted under any other criminal statute. If Congress had intended that criminal cases arising under the Sherman Act should be treated differently from criminal cases arising under other laws, Congress would have so declared. In the absence of such a declaration by Congress the mere fact that two of the defendants have been sentenced to imprisonment is immaterial. That is often the situation of persons accused and convicted of crime who, after affirmance by the Circuit Courts of Appeals of judgments entered on conviction, petition this court for the issuance of the writ sought for here.

Furthermore, in the record it appears that this is not the only time that one of the two defendants referred to—namely, defendant Spencer P. Shotter—has been brought to book for violation of the Sherman Act. On December 11, 1899, Shotter was indicted for an infraction of the interstate-commerce law, pleaded guilty, and paid a fine. On February 11, 1903, he was indicted for violation of the Sherman antitrust law, pleaded guilty, and paid a fine. (Rec., p. 260.)

The petitioners urge that the penal provisions of the Sherman Act require elucidation, enumerating among the reasons for the issuance of the writ:

The great importance of the act involved to the business world and the legal profession, and the need of an authoritative and elucidating decision, particularly as to the penal provisions of the act. (Petition, p. 2.)

And on page 6 of the petition they say:

The Sherman Act does not contain what is within the authorities and upon general principles an adequate description of any criminal offense, and the demurrer raising this point ought to have been sustained.

It is submitted that this contention has no merit. The so-called "penal provisions of the act" merely declare the penalty for the commission of the crime. The description of the offense contained in the statute is made applicable to both civil and criminal proceedings. The first sentence of section 1 and the first clause of section 2 (four and a half lines) describe what constitutes the offense. In section 4 the circuit courts are invested with jurisdiction "to prevent and restrain violations of this act," but what constitutes a violation for the purpose of section 4 is declared by the sentences of sections 1 and 2 above referred to. The description contained in section 1 is also made applicable in forfeiture proceedings by section 6, which declares that any property owned under any contract or by any combination, or pursuant to any conspiracy * * * "mentioned in

section 1 of this act" * * * shall be forfeited. Finally, section 7 provides that any person who shall be injured in his business or property by any other person "by reason of anything forbidden or declared to be unlawful by this act" may recover treble damages. (26 Stat., 209.)

In other words, the interpretation of the statute in any particular case does not depend upon the character of the proceeding brought under the act. Whether the suit be by indictment under the penal clauses of sections 1 or 2, by petition in equity under section 4, by information in rem under section 6, or by complaint in an action at law under section 7 is immaterial. In each case the statute has the same meaning. On the same statement of facts the court can not read the statute one way in one proceeding and another way in a different proceeding. This is elementary. Justice Holmes said in the *Northern Securities Case* (193 U. S.), at page 401:

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words can not be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort.

II.

As to the sufficiency of the indictment.

Assuming for the purposes of this case that the rule laid down by Mr. Justice Jackson, when a circuit judge, in *In re Greene* (52 Fed., 104, 111), is sound, namely, that an indictment following simply the language of the Sherman Act is insufficient for the reason that the words of the statute do not of themselves clearly set forth all the elements necessary to constitute the offense, the question in this case is whether the specific description in the indictment of the acts complained of is adequate to constitute the offense. The defendants have confounded the question of the sufficiency of the indictment to describe the offense with the question of the sufficiency of the statute to declare a crime. The statute has been upheld. Therefore the only question here is whether the indictment adequately describes a violation of the act.

In *Armour Packing Co. v. United States* (209 U. S., 56), Mr. Justice Day said, page 84:

An indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial is sufficient.

The trial judge, District Judge Sheppard, in overruling the demurrer, recognized this principle. He said (Rec., p. 23):

I have considered the indictment in the light of the constitutional requirement that

the accused must be informed of the nature and cause of the accusation against him, and the indictment must impart to him not only all the elements of the offense, but they must be stated in the indictment with clearness and certainty, so as to make the defendant reasonably to understand the act and particular transaction touching which he must be prepared with his proof. The rule is, in prosecutions for offenses against the laws of the United States, the indictment must charge more than the language of the statute upon which it is founded. However, it appears that to some extent this necessity must be governed by the particular facts and circumstances of each case.

It has been held that the test of the sufficiency of the charging or descriptive part of an indictment is not that it might be fuller and more certain, but whether it charges enough to put the defendant on notice of what he may expect to meet in the proof. Without critically reviewing the indictment, the first count charges that the defendant conspired, in the usual form of a conspiracy charge, and then proceeds to describe with some detail how they were engaged in interstate trade and commerce, and the character of the trade points and places, the relation of the officers to the corporation, and then follows a description of the means and ways of effecting the conspiracy.

The second count charges a conspiracy to monopolize, and describes in like manner how the monopoly was to be effected, and the general scheme of effecting the objects of that

conspiracy. I am of the opinion that these counts charge sufficiently the offense of conspiracy to put the defendant on notice of the nature of the accusation.

A critical analysis of the indictment shows that it is sufficient; the pleader did more than declare in the words of the statute that the defendants "unlawfully and knowingly * * * combined, conspired, confederated, and agreed together to restrain trade * * *" (pp. 1, 3). He named twelve ways and means by which they "did unlawfully combine, conspire, confederate, and agree together to restrain trade, and to monopolize trade," which means are enumerated in detail in count 1, pages 3 and 4, and in count 2, pages 7 and 8. Moreover, each of these twelve means is definitely and specifically described, and the acts which the Government intended to prove in support of its twelve averments are set out in the bill of particulars filed by order of the court (pp. 33-37).

The defendants were convicted upon the first two counts of the indictment. The first count charges that the defendants, with divers other persons unknown to the grand jurors, unlawfully combined, conspired, confederated, and agreed together to *restrain trade* and commerce among the several States and with foreign nations in spirits of turpentine and rosin, commonly called naval stores (pp. 1, 3). The second count, after stating that defendants had already secured to themselves more than half of the interstate and foreign trade and commerce in

naval stores, charges that the defendants did unlawfully combine, conspire, confederate, and agree together amongst themselves and with divers other persons to the grand jurors unknown *to further monopolize trade* and commerce, interstate and foreign, in said articles "said monopolizing to be effected amongst other ways as follows" (p. 7). The pleader then enumerates the twelve ways, which are identical in the two counts, and read as follows:

1. By controlling, manipulating, and arbitrarily bidding down and depressing the market and market price of spirits of turpentine and rosin, so that competitors and producers could not sell said articles of commerce except at ruinous prices. (Rec., p. 7.)

The bill of particulars (p. 33) specified the places or markets where the Government expected to show that this manipulation of market prices was done, the names of competitors affected by the manipulation, and the names of the persons by whom it was done, namely, the defendants and certain of their agents. (Rec., p. 33.)

2. By coercing and causing naval stores receipts, which would normally and naturally flow to one port of the United States, to be diverted to another port of the United States. (Rec., pp. 3, 7.)

The bill of particulars names the ports respecting which this proof was to be given, saying:

The Government expects to prove that the diversion of naval stores receipts * * * was forced

and coerced from the ports of Fernandina and Jacksonville, Fla., and Brunswick, Ga., to the port of Savannah, Ga., and that this was done by the defendants themselves. * * * (Rec., p. 33.)

3. By purchasing thereafter at divers times a large part of its supplies at naval stores ports known as closed ports and willfully and with the deliberate intent and purpose of depressing the market, refraining from purchasing any appreciable part of its supplies of naval stores on the Savannah market where its purchases, if made, would tend to strengthen prices and market therefor, the said Savannah market being the basis or primary market in the United States for naval stores, and the said defendants taking the receipts at said closed ports of Pensacola, Tampa, Fernandina, Gulf Port, and Mobile on a basis of the market at Savannah. (Rec., pp. 3, 7.)

No further specification was required respecting this averment, for the allegation was specific. The market price of naval stores, that is, turpentine and rosin, is fixed throughout the United States by what is the market price at Savannah, which is the only primary or open port in the United States. All other ports and markets are closed ports where prices are made on the basis of the closing market at Savannah, with appropriate differentials to cover freight and traffic charges. That is to say, the prices at Pensacola, Tampa, Fernandina, Gulf Port, and Mobile are governed by the price prevailing at Savannah, which is the basic market or port. Having in mind this fact, and the averment (Rec., p. 7)

that the defendants had already secured to themselves more than half of the interstate and foreign trade and commerce in naval stores, the significance of the above allegation of the indictment as a means of acquiring a further monopoly becomes apparent.

4. By coercing factors and brokers into entering into contracts with said defendants for the storage and purchase of their receipts and refusing to purchase from such factors and brokers unless such contracts were entered into. (Rec., pp. 4, 7.)

The bill of particulars specifies the names of certain factors and brokers respecting whom this proof was to be given by the Government at the trial. (Rec., p. 33.)

5. By circulating and publishing false statements as to naval stores production and stocks in hands of producers and their immediate representatives. (Rec., pp. 4, 7, 34.)

The trial court in its charge to the jury eliminated from their consideration this averment, stating that no evidence had been offered in support of it. (See Rec., p. 54, folio 60, and Rec., p. 53.)

6. By issuing and causing to be circulated and hypothecated fraudulent warehouse receipts. (Rec., pp. 4, 7, 34.)

The trial court also withdrew this specification from the consideration of the jury. (Rec., p. 54, folio 60; Rec., p. 53.)

7. By fraudulently grading, regrading, and raising grades of rosins and falsely gauging spirits of turpentine. (Rec., pp. 4, 7.)

The bill of particulars specifies the places at which and dates on which the Government expected to prove that the practice of falsely and fraudulently raising the grades of rosin was carried on. (Rec., pp. 34, 38.)

8. By attempting to bribe employees of competitors and factors so as to obtain information as to competitors' business and stocks. (Rec., pp. 4, 7, 35.)

The trial court withdrew this specification from the consideration of the jury on the ground that no evidence had been offered to substantiate it. (Rec., p. 54, folio 60; Rec., p. 53.)

9. By inducing consumers by payment of bonuses and threats of boycotts to postpone dates of delivery of contract supplies, thus enabling defendants to refrain from purchasing such supplies, which purchases would tend, if made, to strengthen the market and prices. (Rec., pp. 4, 7.)

In the bill of particulars the Government named the persons to whom it expected to show bonuses were paid by the defendants in order to force the postponement of deliveries, and it also named the persons threatened with boycott. (Rec., p. 35.)

10. By making tentative offers of large quantities of naval stores under prevailing markets, intending then and there to accept only contracts for small quantities, and to cover these sales by subsequent purchases to be made on a market thus depressed by the aforesaid fraudulent offers. (Rec., pp. 4, 7.)

The bill of particulars names the persons to whom tentative offers were made and respecting whom proof was given by the Government at the trial. (Rec., p. 36.)

11. By at divers times selling spirits of turpentine and rosin at prices far below the actual cost to themselves, so as to compel competitors to meet said prices, which said prices would be ruinous to themselves as well as to their competitors.

For the specifications of the bill of particulars, see record, page 36.

12. By willfully and arbitrarily fixing the price of spirits of turpentine in the United States below the cost of production.

The specification of the bill of particulars respecting averments 11 and 12 reads as follows (rec., p. 36):

Eleventh and twelfth: Under the eleventh and twelfth specifications in the order of the court the Government expects to prove that in the months of November and December, 1907, the American Naval Stores Co. at Philadelphia, Pa., and Newark, N. J., made sales of spirits of turpentine below the cost of production; that said sales were made at Newark, N. J., by the manager of the New York City office of the American Naval Stores Co. and at Philadelphia, Pa., by the managers of the Philadelphia branch office of the American Naval Stores Co., and divers other sales made at divers other places and on divers other times to consumers and by representatives of the American Naval Stores Co.

at this time to the assistant United States attorneys unknown. The prices at which said sales were made were based on the prevailing Savannah market at those times depressed below the cost of production by the defendants by the various means and in the manner specified in the first and second counts of the indictment.

After the enumeration of the twelve ways and means by which the defendants were to restrain trade (count 1) and to monopolize that trade (count 2) the pleader stated the intent with which the acts were done in a general allegation as follows, count 1, page 4:

Each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such trade and commerce among the several States and foreign nations in the aforesaid articles of commerce, and destroying competition and restraining trade in the aforesaid articles of commerce.

And count 2, page 8:

Each and all of the foregoing means being for the purpose of crushing competitors and driving them out of business, and preventing competitors from engaging in such trade and commerce among the several States and foreign nations in the aforesaid articles of commerce, and destroying competition and monopolizing trade in the aforesaid articles of commerce.

It is submitted that this allegation of intent applies to each of the twelve means enumerated above; that is to say, the pleader charges that in doing each of the acts above specified the defendants were animated with the intent contained in this general allegation, inserted after the enumeration of the twelve means.

In view of the specific allegations contained in the indictment, how can the defendants assert that the indictment was not sufficiently definite to enable them to make their defense? The indictment advised them clearly of the nature and cause of the accusation against them. The most rigorous requirements of criminal pleading were carefully observed. *Armour Packing Co. v. United States* (209 U. S., 56, p. 83).

There can be no question that these allegations, if proved, are sufficient in law to support a conviction. The acts must be considered as a whole, and as governed by the intent alleged in the indictment to crush competitors, destroy competition, and monopolize trade. In the *Swift case* (193 U. S., 375), Mr. Justice Holmes said (p. 396):

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged

are lawful, and that intent can make no difference; but they are bound together as parts of a single plan. The plan may make the parts unlawful.

In *Aikens v. Wisconsin* (175 U. S., 205), Mr. Justice Holmes said:

No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

And in *Loewe v. Lawlor* (208 U. S.), the late Chief Justice Fuller said, on page 301:

So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority; still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out.

III.

As to the charge of the trial court.

For some reason not stated, the record does not contain the full charge of the trial court, but from such parts as are printed in the record in the assignments of error, it is clear that Judge Sheppard, the

trial judge, had a correct apprehension of the meaning of the law. He recognized that mere size of business alone is not unlawful. He said (assignment of error 30, Rec., p. 53):

Since the size of the business alone is not necessarily illegal, it is the crushing of competition by means of force, threats, intimidations, fraud, or artful and deceitful means and practices which violate the law. You will consider carefully all the means which the indictment charges, and inquire first whether the defendants or any two or more of them did in fact unlawfully combine, conspire, confederate, and agree together to monopolize by acquiring such power over the disposition of rosin, turpentine, and naval stores which were the subject of interstate and foreign commerce so that they were capable of forming, and did form, a scheme to crush and stifle competition; and second, if such scheme of gaining and controlling business was to be effected by the illegal methods of force, threats, intimidations, fraud, or artful and deceitful means and practices which their competitors in such trade were necessarily unable to meet.

The trial court held that a corporation can not with its officers alone engage in a conspiracy, but that a corporation and its officers may conspire with other persons or with other corporations; that is, in order to form a conspiracy, which is an agreement between two or more persons, there must be more parties than a corporation and its officers. This certainly was as favorable an instruction as the defendants could have

expected. On this point Judge Sheppard charged (assignment of errors 37, p. 55):

A corporation acts through its officers, its directors, and its agents. While one corporation can not conspire with its own officers, directors, or agents, it may conspire with another corporation or with the officers, directors, and agents of another corporation. Corporations may conspire with individuals as well as individuals may conspire with one another. They may conspire with another corporation, but you must bear always in mind that a corporation is only responsible for the acts of its agents while acting within the scope of their employment or for such acts only as may have been authorized.

The defendants contend that this portion of the charge is illegal for the reason that the only defendant which is a trader was the American Naval Stores Co. and that all of the individual defendants were alleged to be representatives of this company. (Rec., p. 56, folio 62.) The fact is that another corporation, to wit, the National Transportation & Terminal Co., was indicted with the American Naval Stores Co. Three of the defendants, to wit, J. F. Cooper Myers, Carl Moller, and C. J. De Loach, two of whom were convicted, were officers of the National Transportation & Terminal Co. as well as officers of the American Naval Stores Co. (Rec., p. 3.) Furthermore, the indictment charges (count 1) that the defendants, "with divers other persons to the grand jurors aforesaid unknown, conspired together to restrain trade"

(Rec., p. 1), and in count 2 that the defendants, "with divers other persons to the grand jurors aforesaid unknown, did combine, conspire, etc., to monopolize the interstate and foreign trade in naval stores." (Rec., pp. 5, 7.) An examination of the record indicates that others besides the defendants were involved in the transactions complained of. It is not necessary in bringing indictments in conspiracy to indict all the conspirators. (See assignments 38 and 39, Rec., pp. 56 and 57.)

Furthermore, even if the American Naval Stores Co. was the only trader named in the indictment, that fact would be immaterial under the decision of this court in *Loewe v. Lawlor*. (208 U. S.) The *Loewe* case decided that persons not engaged in interstate commerce may engage in a combination restraining interstate commerce in violation of the Sherman Act. In any case, the important fact is not whether the defendants are engaged in interstate commerce, but whether the acts of the parties to the combination effect a restraint of interstate commerce which contravenes the Sherman Act. In this indictment the trade restrained was interstate trade being carried on by the competitors of the American Naval Stores Co. The defendants combined to restrain that trade by the methods described in the indictment and they also combined to monopolize that trade. The fact that some or all of the defendants may or may not have been engaged in interstate commerce in naval stores is immaterial.

Assignments 26 and 28 (Rec., p. 52) contain requested instructions to charge, submitted by counsel for the defendants, which the court granted. It is difficult to see how the defendants can object to the very proper qualifications which the court added to those instructions. According to assignment 26 (Rec., p. 52), the court charged the jury at the request of the defendants:

A business corporation like the American Naval Stores Co. has a perfect right to buy when and where it pleases, and to refrain from buying when and where it pleases. It has a perfect right to refuse to enter into contracts if it does not wish to do so. It has a perfect right to select its own customers and to refrain from dealing with people that it does not for any business reason care to deal with. Its failure to buy from a competitor may cause the competitor to fail, but the law does not attempt to prevent anything of that kind. The constitution of the State guarantees to traders the liberty of contract.

The court added, after giving this instruction, the following:

This is true provided * * * this is the qualification which the judge gives you: This is true provided that such corporations do not violate the interstate law or statute, as I have explained to you in my general charge.

The record does not contain the part of the charge referred to, and this court can not assume that the part omitted was improper.

In assignment 28 (Rec., p. 52) the court charged the jury, at the request of the defendants, as follows:

If one trader, be it a corporation or a natural person, by reason of larger wealth and resources or other lawful advantages, can undersell a rival and put the rival out of business, or declines to deal with the rival and thus puts him out of business, there is no law against this. Such a power is an incident often of large means or greater business ability and skill, and the law does not attempt to interfere with such advantages—

The court added a very proper qualification—

Unless the methods and practices adopted for the control of interstate trade and commerce would result in restraint of such trade and commerce, which I have previously explained to you in my general charge.

The part of the charge above referred to is also omitted.

See also the portions of the charge contained in assignments 33, 34, 35, 36, 37, 38, and 39, all of which are favorable to the defendants. (Rec., pp. 53-57.)

IV.

As to the sufficiency of the evidence.

We shall not attempt to review the evidence in this case, which will be found in the record, pages 83-285. We shall restrict this memorandum to a consideration of certain phases of the trade and commerce in naval stores which may be helpful to the court in reading the record.

In order to have a clear understanding of the materiality and value of the testimony introduced by the Government and the defendants upon which the trial court based its refusal to direct a verdict and the Circuit Court of Appeals of the Fifth Circuit affirmed the judgment below, entered on conviction, and subsequently denied a motion for a rehearing, it is necessary to describe briefly the interstate and foreign trade and commerce in naval stores.

"Naval stores" is a trade name applied to spirits of turpentine and to rosin, which are the products of crude gum gathered from long-leaf yellow pine. There is only one grade of spirits of turpentine capable of being manufactured by ordinary distillation of gum. There are, however, 14 grades of rosin, that is, A, B, C, D, E, F, G, H, I, J, K, L, M, N, WG, and WW. The cheapest and darkest of these grades are A, B, and C. They become clearer in color and higher in price, advancing regularly to the grade of WW, or "water white" rosin. The sole test of quality, class, and value of rosin is color.

Persons engaged in the naval-stores industry may be divided generally into three classes: First, producers or operators; second, factors; third, distributors or exporters. The producer or operator is the individual who takes the crude gum from the long-leaf yellow pine tree, and by the process of distillation manufactures spirits of turpentine and rosin. The factor is the individual who makes advances to the producer or operator under contracts requiring the shipment of the manufactured products to the

factor, who then sells for the account of the producer; in other words, the factor is a sort of commission man. The distributor or exporter is the individual who purchases naval stores from the factor and sells the same to the consumer either in the domestic or foreign market. The American Naval Stores Co., indicted in the court below, was a distributor or exporter; that is to say, it bought from the factors.

The total American crop, which was approximately 90 per cent of the world's crop of naval stores for the year prior to the return of the indictment in this case, was about 600,000 barrels of turpentine and 1,000,750 round barrels or packages of rosin. (Rec., pp. 99, 227.) Each of these round barrels or packages of rosin contains a little less than two standard or quotation barrels of rosin, containing 280 pounds.

Approximately 75 per cent of the American crop of naval stores is produced in the States of Georgia and Florida, and substantially all in the States of North and South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. Less than 2 per cent of the entire American crop is used in the States producing it. Therefore practically the entire American crop enters into interstate or foreign commerce.

There is only one open or quotation market in the United States for the sale of naval stores. This is Savannah, Ga. The market price of turpentine per gallon and of rosin per standard or quotation barrel

of 280 pounds is determined throughout the United States by the quotation price at Savannah, Ga. This city is what is known as an "open" market or port. At all other ports and markets prices are made on the basis of the closing market at Savannah, with appropriate differentials to cover freight and traffic charges. For instance, if a person in Jacksonville, Fla., were to ask a factor at Jacksonville his price for 100 barrels of rosin, the factor would give the quotation price prevailing at the time in the open market at Savannah, with appropriate differentials to cover freight and traffic charges. Accordingly, any depression of the market price at Savannah effects a corresponding change throughout the United States. One of the charges of the indictment is that the defendants conspired to stay off the Savannah market in order to depress that market, and during that time they were to make large purchases at closed markets, where the prices would be depressed because the Savannah market, the basic market, was depressed. (Rec. pp. 164, 173.)

The jury brought in no verdict as to the two corporation defendants, namely, the American Naval Stores Co. and the National Transportation & Terminal Co. The first company is a West Virginia corporation, the second is a corporation of New Jersey. The American Naval Stores Co. owns all the stock in the other corporation, and also owns the entire capital stock of the American Naval Stores Co. of New York, and the latter company has the same executive officers as the West Virginia

company. The New York corporation owns all the stock of the National Transportation & Terminal Co. of New York. The West Virginia company also controls the American Pine Products Co., Hamburg, and the Rosin & Turpentine Importing Co. of the United Kingdom. (Rec., p. 195.)

Defendant E. S. Nash is president, and defendant S. P. Shotter chairman of the board of directors, and defendant J. F. C. Myers vice president of the American Naval Stores Co. Defendant G. M. Boardman is treasurer of the American Naval Stores Co. Myers is also president of the National Transportation & Terminal Co. Defendant Carl Moller is manager of the Jacksonville branch of the American Naval Stores Co. and also manager of the same branch of the National Transportation & Terminal Co. of New Jersey.

The defendants, through the corporations of which they are officers, control the disposition of more than 50 per cent of the entire crop of naval stores, both of turpentine and rosin. (Rec., p. 229.)

The witnesses Barnes (Rec., pp. 96 et seq.), Sweat (Rec., pp. 147 et seq.), and McMillan (Rec., pp. 149 et seq.) described the manner of the production of spirits of turpentine, the cost of production, the method of marketing, and general conditions from the standpoint of the producer, and showed that during the period under investigation and covered by the indictment the price of naval stores fell far below the cost of production.

The witnesses Smith (Rec., p. 101), Parker (Rec., p. 126), and Register (Rec., p. 228) described the method of inspection, gauging, and grading of spirits of turpentine and rosin.

The witnesses Patterson (Rec., pp. 103 et seq. and 172 et seq.) and Martin (Rec., pp. 167 et seq.) described the general market conditions and the effect of the operations of defendants.

During the year under investigation the price of spirits of turpentine had declined from 63 cents per gallon on May 1, 1907, to 48½ cents per gallon on March 16, 1908 (Rec., pp. 189, 190). It costs at least 52 cents per gallon to produce spirits of turpentine, and accordingly the price had been depressed below the cost of production. According to the testimony of E. S. Nash (Rec., p. 239), during the month of March, 1908, when the price was below the cost of production, the American purchased 80 per cent of the spirits of turpentine at the closed ports of Jacksonville, Fernandina, and Tampa, and made only infinitesimal purchases of spirits of turpentine at Savannah, the primary market, although, as the witness Tunno, a factor at Savannah, testified, the American during the preceding four or five years had bought from 70 to 80 per cent of the receipts of naval stores at Savannah (Rec., p. 123). These tactics by the largest distributor naturally and undoubtedly forced the price down on the primary market, which market, as stated above, governed the prices at the other places, and enabled the American to secure its sup-

plies at the other ports under its exclusive contracts, hereafter described, at largely reduced prices. The object of entering into the exclusive contracts for the purchase from factors of their receipts at the closed ports becomes apparent.

Each of the defendants, Nash and Shotter, admitted that there had been a manipulation of the Savannah market during the first months of 1908, just prior to the indictment, but each of them denied having had any part in that manipulation. (Rec., pp. 229, 240, 250.) Their evidence, in so far as they admitted that there had been a manipulation, supported the position of the Government, which contended that the manipulation was accomplished by the defendants and others for the purpose of putting the Patterson Export Co. and other small competitors of the American Naval Stores Co. out of business. (Rec., pp. 33 and 7. The Patterson Export Co. is no longer in existence. (Rec., pp. 122, 172, 176, 178.) The Naval Stores Export Co. is also out of business. (Rec., pp. 184 and 188.)

According to the testimony of witnesses West, Richmond, and Harris (Rec., pp. 83-96), the American Naval Stores Co., the largest distributor or exporter in America, boycotted West, Flynn & Harris Co., a firm of factors, and refused to make that company a bid for any of their receipts of naval stores at Jacksonville, Fla. After the West company had diverted their receipts to Savannah in the hope of finding a market there, the American Naval Stores

Co. also boycotted them at that point until the West, Flynn & Harris Co. agreed to enter into an exclusive contract for the sale to the American Naval Stores Co. of all of its receipts at the closed ports; that is, ports outside of Savannah. The contract also required them to store their receipts upon the yards of the National Transportation & Terminal Co. and to pay a certain annual sum to this company for all receipts which were not stored at those yards; that is, they were obliged to pay for services not performed. These witnesses also testified that Shotter had made the statement to them that he had required the same sort of a contract from all other factorage companies, and he so testified. (Rec., p. 247.)

While the market manipulations above described were going on, and the contracts being entered into and enforced to compel the storage of naval stores upon the yards of the National Transportation & Terminal Co., according to the testimony of the witness Hoskins (Rec., p. 143), habitually from one-half to 1 gallon was tolled out of every barrel of spirits of turpentine belonging to the American Naval Stores Co. shipped coastwise from these yards at Jacksonville. During the year under investigation, according to the testimony of the witnesses O'Keefe (Rec., p. 103), De Groot (Rec., p. 113), Clahan (Rec., p. 119), and Mahoney (Rec., p. 120), 60,000 round barrels of rosin, equivalent to almost double that number of quotation barrels of 280 pounds, were graded up without reinspection on the yards of the National Transportation &

Terminal Co. at Brooklyn, N. Y.; that is to say, each of these barrels, though officially graded at a certain grade, was marked by the defendants one grade higher in order to receive the price obtainable for the higher grade.

See the letter of defendant Boardman to defendant Myers (Rec., p. 279) and the testimony of the witness Coachman thereon (Rec., pp. 184 and 266).

V.

As to certain suggestions of the petitioners.

The petitioners insist that the trial court erred in allowing certain evidence respecting cheating and swindling by the defendants to be introduced at the trial, stating that prosecution for such acts, if they were committed, should be under State laws. (Petition, p. 5.) They say:

If this theory be sound, then a corporation trading in groceries could be convicted of a violation of this Federal statute if it appeared that its officers and employees put sand in the sugar sold by them, or used false weights or measures, or did anything else that was criminal or wrong.

If this theory be sound, then any case of alleged fraud or conduct claimed to be ethically wrong in business tactics can be brought within the terms of this statute.

It is true that the record contains a great number of instances in which it was shown that the agents of the American Naval Stores Co. deliberately upgraded barrels of rosin; that is to say, sold those barrels at

higher grades than they had been marked by the State inspectors of Georgia and Florida. (Rec., pp. 108, 110, 113 fol. 145, 118, 120, 134 fol. 174, 136, 157, 181.) The record also shows that it was the practice of the National Transportation & Terminal Co. and of its officers to reduce the contents of barrels of turpentine which had been passed by the State inspector after the inspection by that officer. (Hoskin's testimony, pp. 143 et seq; 151, 153, 154, 179.) Now, the theory of the Government was that these were means used by the defendants in order to obtain a monopoly and in order to put their competitors out of business. In the *Swift case* (196 U. S., 375) this court held that the practice of getting advantages in the cost of transportation by railroads might be an unlawful means of acquiring a monopoly. In that case it was suggested by Mr. Justice Holmes that the advantages obtained might not be in violation of the interstate commerce act of 1887, but still if the advantages were acquired as one of the means of accomplishing a monopoly, they became unlawful. He said (p. 402):

It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective unlawful, still a combination to use it for the purpose prohibited by the act of 1890 justified the adjective and takes the permission away.

Under the decision of this court in the Swift case, it is clear that what may be a violation of one law may be also unlawful as a means to accomplish a violation of the Sherman law. Accordingly, the trial court was right in allowing these facts to go to the jury as one of the means by which it is claimed the defendants were conspiring to monopolize the interstate and foreign trade in naval stores and drive out of business their competitors in that trade. The mere fact that the means adopted were acts which may have violated State laws does not preclude them from being acts intended and planned to bring about a monopoly.

The effect of these operations upon competition in interstate and foreign commerce is graphically stated by the witness Martin (Rec., p. 164), as follows:

If one competitor under average market conditions were permitted to raise the grade of rosin one grade, it would be ruinous to competitors because of the spread maintained between various grades and the thin margin of profit customary in the business; they could not meet the price made by the party who resorted to such tactics. Assuming a spread of 50 cents between N and WG, a price made for WG based on that market would be \$6.25; if a competitor was intending to supply N he could cut under 5 or 10 cents and would just simply take the business. The other man could not meet the offer at all. If one or more competitors are permitted to deliver a half or three-quarters of a gallon of turpentine less

than was sold, the result upon other competitors would be ruinous, as described in the rosin, although accomplished in a different manner.

and by the witness Patterson (Rec., pp. 174, 175), as follows:

During the conditions of normal production and normal markets, if one competitor is permitted to or does mark rosin at a grade above its real grade, the effect upon others is that they would not be able to sell their stuff and therefore would not be able to buy in the market. The effect of that upon the Savannah market would be that it would sag, unless there were other buyers. As an illustration, I was going to say that if a customer should ask us to name a price on 500 barrels of a certain grade of rosin, we might say, for instance, G, I would have to name a price based on the Savannah market, usually with a small profit added. If the competitor should intend to supply a lower grade and should also be asked to make a bid, he would probably bid lower than mine, and he would probably get the order, so I would fail altogether; I would not be able to sell. The effect upon the business of competitors in the producing and distributing of turpentine, if one competitor were permitted to deliver from a half-gallon to a gallon less than he contracted to deliver, would be exactly the same as in rosin, for the reason that the competitor is intending to supply goods half a gallon short, and could make his profit on the half gallon. Nineteen hundred and seven was a season of great decline. When

the season started in, turpentine was about 60 cents, and went down to 40, the decline beginning quite early in the season—in April. It was still down in May, June, July, and August, according to the best of my recollection. There may have been some slight recovery during that time. It was still down in September, and in October a financial crisis occurred. The decline I speak of preceded that.

The contention of the petitioners that the Circuit Court for the Southern District of Georgia had no jurisdiction is entirely without merit. The law is well established that a prosecution for a conspiracy will lie in any district in which acts have been committed pursuant to the conspiracy, and in order to carry out the objects of the conspiracy. Many of the acts proven at the trial were done at Savannah. The West, Flynn & Harris contract was signed, and the negotiations leading up thereto were principally had within the city of Savannah, within the eastern division of the Southern District of Georgia. Conferences in regard to that matter were had at Savannah. The principal office of the American Naval Stores Co. was in Savannah. The reports from Moller at Jacksonville and Dill in New York were received at Savannah. The general control of the operations of the defendants was from Savannah. The Boardman letter (Rec., p. 279) was received by Myers in Savannah. The basic or primary market where the market manipulations were carried on was Savannah.

Petitioners contend that the indictment is defective for the reason that no overt act is alleged after the descriptive part of the indictment, contending that section 5440 applies. This objection is one of form rather than of substance, for even if overt acts were alleged at the end of the indictment, these overt acts could not be called upon to enlarge the necessary allegations of the indictment; that is, if the descriptive part of the indictment were insufficient by reason of certain defects, those defects could not be supplied by looking to the overt acts. (*U. S. v. Britton*, 108 U. S., 204; *U. S. v. Patterson*, 55 Fed., 605.)

The lower courts have held that section 5440 does not apply to conspiracies in restraint of trade brought under the Sherman Act. (*U. S. v. Patterson*, *supra*; *U. S. v. MacAndrews & Forbes Co.*, 149 Fed., 823; *U. S. v. Kissell*, 173 Fed., 823.)

The object of section 5440 was, as this court has stated, to provide a *locus penitentiae* so that if the persons who had conspired should repent and abandon their conspiracy before doing anything to accomplish the object of the conspiracy, they might avoid the penalty prescribed by the statute. (*United States v. Britton*, 108 U. S., 204.) On the other hand, a conspiracy to restrain trade or a conspiracy to monopolize trade is continuous, and is proven by a series of acts from which the jury may infer that the defendants have reached an agreement to accomplish the result forbidden by the Sherman Act. In the case at bar,

the conspiracy was proven by a number of acts from which the jury inferred that at some time the defendants had agreed together to restrain and monopolize trade in the manner and by the means described in the indictment.

Mr. Justice Holmes said, in *United States v. Kissell* (218 U. S.), at page 607:

A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.

This sort of a conspiracy was proven in the case at bar.

We submit for the foregoing reasons that this is not a case calling for the issuance of the writ, which is an extraordinary and discretionary remedy, as this court has often pointed out. This is the third time that the defendant Shotter has been sentenced for

violation of the commerce laws of the United States, he having been fined in 1899 for violation of the interstate-commerce law and in 1907 for violation of the antitrust law. His sentence to imprisonment for the third offense was to be expected. The only other defendant sentenced to imprisonment was J. F. C. Myers, president of the National Transportation & Terminal Co., which company carried on most of the fraudulent practices above referred to. He was also vice president of the two American Naval Stores companies of West Virginia and New York. Upon the other three defendants were imposed fines of from \$2,000 to \$5,000.

In the absence of any grave question of law hitherto undecided and requiring the decision of this court, we respectfully submit the writ should be denied.

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